Hearing Date: January 16, 2013 at 10:00 A.M. ET
Response Deadline: January 9, 2013 at 5:00 P.M. ET

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11 Case No.
	)	08-13555 (JMP)
LEHMAN BROTHERS HOLDINGS INC., *et al.*,	)	
	)	
Debtors.	)	Jointly Administered

REPLY IN FURTHER SUPPORT OF THE DEBTORS' OBJECTION TO THE BOILERMAKERS CLAIMS REQUESTING SUBORDINATION PURSUANT TO SECTION 510(b) OF THE BANKRUPTCY CODE

Lehman Brothers Holdings Inc. ("***LBHI***") and its affiliated debtors, in the above referenced chapter 11 cases, as debtors and debtors in possession (collectively, the "***Debtors***"), hereby file this reply (the "***Reply***") to the response [Dkt. No. 20824] (the "***Response***") filed by the Boilermakers-Blacksmith National Pension Trust Fund ("***Boilermakers***") to the *Debtors' One Hundred Eighty-Third Omnibus Objection to Claims (No Liability CMBS Claims)* [Dkt. No. 19407] (the "***Objection***").[1] The Debtors respectfully state as follows:

[1] All capitalized terms used but not defined herein shall have the meaning ascribed to them in the Objection.

PRELIMINARY STATEMENT

1. The Debtors initially objected to the Boilermakers Claims on the grounds that, among other things, Boilermakers lacked privity to assert claims against the Debtors. In the Response to that Objection, Boilermakers, for the first time, asserted that its Claims are based on the Securities Act of 1933, not principles of contract law. According to Boilermakers' Response, its claims arise out of the purchase of the CMBS Securities and one of the Debtors, Structured Asset Securities Corporation ("***SASCO***"), was the "issuer" of those securities. Regardless of the merits of Boilermakers' federal securities claims – and the claims have no merit – such claims must be subordinated to general unsecured claims pursuant to the express language of section 510(b) of the Bankruptcy Code because they plainly arise from the purchase or sale of securities of the Debtors.

2. Section 510(b) of the Bankruptcy Code provides, in pertinent part, that "a claim arising from…a purchase or sale of a security of the debtor or of an affiliate…shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such a security…" *See* 11 U.S.C. § 510(b). Bankruptcy Courts have routinely interpreted section 510(b) of the Bankruptcy Code to apply to both debt claims and equity interests (*i.e.*, "claims or interests") when a party in interest seeks to elevate its priority in a debtor's capital structure by asserting claims that are derived from its subordinated position.

3. Boilermakers Claims fit squarely within the contours of section 510(b) of the Bankruptcy Code for three simple and incontrovertible reasons. ***First***, there is no question that the CMBS Securities held by Boilermakers are a "security" as defined in Bankruptcy Code section 101(49) (which includes, among other things, notes, stock, bonds, debentures, certificates, and other claims or interests commonly known as a security) and, therefore, as referred to in section 510(b) of the Bankruptcy Code. Indeed, these securities were offered for

sale through a registration statement filed with the Securities and Exchange Commission ("***SEC***"). And, throughout its Response, Boilermakers refers to its holdings as "securities."

4. ***Second***, Boilermakers almost lifts the language from section 510(b) of the Bankruptcy Code verbatim by acknowledging that its claims are "for damages arising out of the [Boilermakers'] purchase, acquisition and/or ownership of the subject securities." *See* Response at pages 2 and 3.

5. ***Third***, Boilermakers concedes that the CMBS Securities are securities "of the Debtors" for purposes of section 510(b) of the Bankruptcy Code by alleging in its Response, and therefore admitting, that SASCO, a Debtor in these chapter 11 cases, is the "issuer" of the subject securities. *See* Response at paragraph 9. Boilermakers' admission in this regard is amply supported by the applicable SEC rules and regulations, all of which make it clear that SASCO was the "issuer" of the CMBS Securities. And because SASCO was the "issuer" of the CMBS Securities, the CMBS Securities are securities "of a debtor or of an affiliate" for purposes of section 510(b) of the Bankruptcy Code.[2]

6. Accordingly, the Boilermakers Claims fit squarely within the plain language of section 510(b) of the Bankruptcy Code and must be subordinated to general unsecured claims.

BACKGROUND

A. Brief Overview of a CMBS Transaction

7. A CMBS transaction begins when an entity or entities "originates" mortgage loans, secured by collateral, to a commercial or retail borrower. After the mortgage loans are closed, the loans are purchased from the originator by a bank or other financial institution. The entity that purchases the mortgage loans then assembles a group of loans into "pools." The pools

[2] Boilermakers further asserts that Debtor LBHI had "control over the entire securitization and underwriting process by which the securities were made available," thereby bringing its claims within section 510(b) of the Bankruptcy Code for a separate and independent reason. *See* Response at paragraph 8.

of mortgage loans are then transferred to a "sponsor," who in turn, transfers them again to a "depositor." The "depositor," which also acts as the "issuer" of the securities, then establishes a trust as a vehicle into which the mortgage loans are deposited and through which the issuer issues securities that are collateralized by the interest and principal payments on the loans (the "***CMBS Securities***").

8. Each securities offering through the trust involves multiple classes, or "tranches," of certificates. Distributions from the trust are subject to a "waterfall" where the most senior certificates have the first right to cash flows from the mortgage loan pool. Excess cash, if any, then flows down to the next tranche, and so forth. The trust has the responsibility of ensuring that certificate holders receive the amounts due from the loan pools. Not surprisingly, the risk and potential return of the certificates has an inverse relationship with the certificates' seniority or place in the waterfall.

9. To market such certificates, investors are given information that is often jointly prepared and distributed by, among others, the sponsor, depositor, and underwriters. This information is conveyed through offering documents such as the registration statements, including the prospectuses and prospectus supplements.

B. The Debtors' Role in the CMBS Transaction

10. In the CMBS transaction described herein, LBHI, a Debtor, originated and/or purchased the mortgage loans that formed the collateral for the CMBS Securities. Lehman Brothers, Inc. ("***LBI***"), a broker-dealer affiliate of LBHI currently involved in a proceeding under the Securities Investor Protection Act ("***SIPA***"), served as the underwriter for the offerings. SASCO, a Debtor, served as the "issuer" and as the "depositor" for the offerings. As the issuer and depositor, SASCO created the non-debtor securitization trusts (the "***Trusts***") to serve as what the federal securities rules and regulations refer to as the "issuing entities" in order

to distinguish those entities from the issuers themselves.[3] *See infra* paragraphs 29-34; *see also* SASCO Registration Statement, S-3/A (filed August 8, 2006) (The Trusts are "established to hold assets transferred to it by Structured Asset Securities Corporation.").[4] SASCO then conveyed the pooled mortgages to the Trusts, as the issuing entities, through certain loan sale agreements between SASCO and the Trusts. Boilermakers then purchased the CMBS Securities from the Trusts, in their capacities as the "issuing entities" for SASCO as the "issuer." According to Boilermakers, it "purchased or otherwise acquired interests" in these Trusts "pursuant or traceable to two Registration Statements with accompanying Prospectuses filed with the Securities and Exchange Commission by SASCO." *See* Response at paragraph 5.

C. The Boilermakers Claims

11. Boilermakers filed claim number 32209 against LBHI, for its role in the securitization and underwriting process, and filed claims numbered 67201-67209, 67211-67212 against SASCO, for its role as the issuer and depositor for each offering. The proofs of claim did not reference claims under the federal securities laws or any similar state or common law cause of action.

12. Boilermakers was also a named plaintiff in a securities class action suit, *In re Lehman Brothers Mortgage-Backed Securities Litigation*, No. 08 Civ. 6762, filed in the United States District Court for the Southern District of New York (Kaplan, J.) (the "***District Court***"), alleging violations of Sections 11, 12, and 15 of the Securities Act of 1933 in connection with

[3] With respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors, the federal securities laws distinguish between the trust as the issuing entity and the "issuer," who is "the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued." 15 U.S.C. § 77b(a)(4).

[4] This registration statement relates to one of the securities Boilermakers references in its federal securities complaint for the MBS Litigation, which is incorporated by reference in footnote 2 to the Response. *See* Response at page 3.

the issuance and sale of certain mortgage-backed securities (the "***MBS Litigation***"). As Boilermakers explains in its Response, LBHI and SASCO were not named as defendants in the MBS Litigation in deference to the automatic stay. *See* Response at paragraph 4. Settlement of the MBS Litigation on a class-wide basis has been approved by the District Court and is now final.

13. On August 22, 2011, the Debtors filed the Objection which sought to disallow and expunge Boilermakers Claims on the grounds that the Debtors have no liability for Boilermakers Claims. The Debtors' Objection pointed out that because there is no contractual relationship between Boilermakers and the Debtors (*i.e.*, no privity), there is no enforceable right to payment against the Debtors and, thus, Boilermakers Claims should be disallowed and expunged.

14. On October 13, 2011, Boilermakers filed its Response to the Objection and the Debtors' lack of privity points, contending, among other things, that (a) its claims arise from the purchase of securities and, thus, are based on federal securities law not principles of contract, and (b) the Debtors, not the Trusts, were the real issuers of the CMBS Securities.

ARGUMENT

15. Irrespective of the merits of the Boilermakers Claims – and they are meritless as a matter of federal securities law – such claims must be subordinated to general unsecured claims pursuant to section 510(b) of the Bankruptcy Code because they are claims for damages arising from the purchase or sale of a security of the Debtors.

16. Section 510(b) of the Bankruptcy Code provides that:

> For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, ***for damages arising from the purchase or sale of such a security***, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

11 U.S.C. § 510(b) (2006) (emphasis added).

17. To determine whether a claim is subject to subordination under section 510(b) of the Bankruptcy Code, the security underlying the claim at issue must be a "security" "of the debtor" and the claim at issue must "aris[e] from" the "purchase or sale" of that security. *See, e.g.*, *Rombro v. Dufrayne (In re Med Diversified)*, 461 F.3d 251 (2d Cir. 2006) (for a claim to be subordinated under section 510(b) it must "arise from" the purchase or sale of a security "of" the debtor); *In re Enron*, 341 B.R. 141, 150-151 (Bankr. S.D.N.Y. 2006) (same); *see also In re CIT Group, Inc.*, 460 B.R. 633, 637-638 (Bankr. S.D.N.Y. 2011) (analyzing whether the claim at issue is one for damages "arising from" the sale of a security to determine if the claim is subject to subordination under section 510(b)).

18. Here, Boilermakers Claims fit squarely within the plain language of section 510(b) of the Bankruptcy Code and, therefore, must be subordinated to general unsecured claims.

A. The CMBS Securities at Issue are "Securities" Under the Bankruptcy Code.

19. Boilermakers does not dispute that it bought securities as defined in the Bankruptcy Code. Indeed, Boilermakers routinely refers to the instruments it purchased (the CMBS Securities) as "securities" throughout its response. Moreover, the CMBS Securities clearly fit within the definition of "security" set forth in section 101(49) of the Bankruptcy Code. *See* 11 U.S.C. § 101(49) (which includes a note, stock, bond, collateral trust certificate or voting

trust certificate, among other things). Accordingly, there is no dispute that the CMBS Securities are "securities" for purposes of section 510(b) of the Bankruptcy Code.

B. Boilermakers Claims "Arise From" the Purchase of the CMBS Securities.

20. It is equally undisputed that Boilermakers Claims arise out of and flow directly from Boilermakers' purchase of the CMBS Securities. 11 U.S.C. 510(b) (2006); *see, e.g.*, *In re Enron Corp.*, 341 B.R. at 150 (determining that the claim at issue arose from the purchase or sale of a security as required for subordination under section 510(b)). It is hornbook law that, in order to maintain a cause of action under Sections 11 or 12 of the Securities Act of 1933 (which forms the basis for the Boilermakers Claims here), a party must have purchased a security in the first instance. *See, e.g.*, Securities Act § 11(a); 15 U.S.C. § 77k(a) (stating that "any person acquiring such security" that is the subject of the registration statement has a cause of action); Securities Act § 12(2)(b); 15 U.S.C. § 77l(a)(2) (stating that the party violating this section is liable to "the person purchasing such security"). Here, Boilermakers alleges violations of sections 11 and 12 of the Securities Act. *See* Response at paragraph 4. For such allegations to be actionable under federal securities law, Boilermakers must have actually purchased or sold the CMBS Securities. Thus, in order for the Boilermakers Claims to be valid under federal securities law they would be required to satisfy the "arising from" prong of section 510(b) of the Bankruptcy Code.

21. Once again, Boilermakers all but admits as much in its Response. For example, Boilermakers states that "[t]he Debtors' liability to the Boilermakers, as asserted in the Boilermakers Proofs of Claim, is a result of, with respect to LBHI, LBHI's control over the entire securitization and underwriting process by which the securities were made available." *See* Response at paragraph 8. Likewise, Boilermakers states that "based upon SASCO's status as a depositor of the subject securities, SASCO is liable to the Boilermakers for the SASCO Claims."

Response at paragraph 10; *see also* Response at paragraph 1 (noting that the Boilermakers Claims are "for damages arising out of the [Boilermakers'] purchase, acquisition and/or ownership of the subject securities.").

22. Thus, because under the federal securities laws a claim for money damages must be based on an actual purchase or sale of a security and because Boilermakers acknowledges that its Claims directly flow from its purchases of the CMBS Securities, Boilermakers Claims "arise from" the purchase of the CMBS Securities for purposes of section 510(b) of the Bankruptcy Code.

C. The CMBS Securities are Securities "of" the Debtors.

23. The final prong of section 510(b) of the Bankruptcy Code requires the security in question to be a security "of the debtor" or the debtor's affiliate. For purposes of section 510(b), a security, like the CMBS Securities, is a security "of the debtor or of an affiliate" whenever the debtor or its affiliate is an "issuer of the security." *See In re Washington Mutual*, 462 B.R. 137, 146 (Bankr. D.Del. 2011) ("***WaMu***") (analyzing whether the debtor was the "issuer" of the securities in question for purposes of determining whether the securities were securities "of" the debtor under section 510(b) of the Bankruptcy Code); *In re Holiday Mart, Inc.*, 715 F.2d 430, 433-34 (9th Cir. 1983) (stating that "[p]urchasers of [securities], like purchasers of stock, alone assume the risk of fraud or securities act violations by the ***issuers*** of the securities they purchase, and there is no reason to ask general creditors who did not purchase [securities] to share in any part of that risk") (emphasis added).[5]

[5] For the Court's benefit, the Debtors note that interested parties in the *In re Residential Capital, LLC* chapter 11 cases (Glenn, J.) have sought a declaration that their federal securities-based claims cannot be subordinated under section 510(b) of the Bankruptcy Code. (Case No., 12-12020, Dkt. No. 2284). While that case also involves mortgage-backed securities, unlike this case, the movants did not admit that the Debtor is an "issuer" of those securities. On information and belief, the ResCap matter is not yet fully-briefed but is currently set for hearing on January 29, 2013. Additionally, substantially similar subordination issues will need to be resolved in

1. The *WaMu* Decision

24. Like this case, *WaMu* involved a creditor's claim arising out of the purchase of mortgage-backed securities and a debtor's attempt to subordinate that claim pursuant to section 510(b) of the Bankruptcy Code. Unlike this case, however, the creditor in *WaMu* contested whether, and did not acknowledge that, the debtor was the "issuer" of the subject securities. *See id.* at 145-147; *cf.* Response at paragraph 5. So, to determine whether the security at issue was a security "of the debtor" for the purposes of section 510(b) subordination, Judge Walrath looked to see which entity was the "issuer" of that security. *Id.* at 147. Based on the authorities placed before the court, Judge Walrath concluded that the trusts, not the debtors, were the "issuers" of the securities; accordingly, Judge Walrath held that the securities were not securities "of the debtor" for purposes of section 510(b). *Id*.

25. On a motion for reconsideration in *WaMu*, it became clear that Judge Walrath had not been provided with the applicable federal securities laws and regulations which show clearly that the "depositor" is the "issuer" of collateral-trust certificates, like the CMBS Securities, and the trusts are merely "issuing entities." Judge Walrath was not required to and did not rule on the reconsideration motion. But, after reviewing these authorities and hearing oral argument on the motion, Judge Walrath stated that the court's prior decision was "not law of the case." *See WaMu* Hearing Transcript, May 7, 2012, Page 125, line 14, a copy of which is annexed hereto as **Exhibit A**.

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this case when this Court considers certain securities claims filed by Fannie Mae and the *Debtors' One Hundred Twenty-Seventh Omnibus Objection to Claims (Settled Derivative Claims)* [Dkt No. 16111].

2. SASCO is the "Issuer" of the CMBS Securities under Federal Securities Law

26. It is beyond doubt that SASCO is the "issuer" of the CMBS Securities purchased by Boilermakers. It necessarily follows, therefore, that the CMBS Securities are securities "of" SASCO for the purposes of section 510(b) subordination. *In re Washington Mutual*, 462 B.R. at 146. This is the case as a matter of both fact and law.

27. ***First***, as a matter of fact, Boilermakers, unlike the creditor in *WaMu*, readily admits and explicitly states that SASCO is "considered the issuer" of the CMBS Securities. *See* Response at paragraph 9. That admission is not surprising given that, among other things, SASCO prepared and signed the registration statement for those CMBS Securities.

28. ***Second***, as a matter of federal securities law, it is well-settled that SASCO is the issuer of those securities. Under those authorities, the "issuer" is the "depositor," or SASCO here, and the trusts are technically referred to as "issuing entities," not issuers. Indeed, the statutes and regulations regarding asset-backed or collateral-trust securities, like the CMBS Securities here, draw a very clear distinction between an "issuer," on the one hand, and an "issuing entity," on the other hand. *See* Securities Act of 1933, § 2(a)(4); 15 U.S.C. § 77b(a)(4); Securities Exchange Act of 1934, § 3(a)(8), 15 U.S.C. § 78c(a)(8) (In regard to asset-backed securities under these securities laws, the "issuer" is the "person or persons performing the acts and assuming the duties of the depositor" and not the issuing entity.).

29. For example, section 2(a)(4) of the Securities Act of 1933 provides, in relevant part: "[w]hen used in this title, unless the context otherwise requires -- (4) the term "issuer" means every person who issues or proposes to issue any security; except that with respect to…collateral-trust certificates, or with respect to certificates of interest…***the term "issuer" means the person or persons performing the acts and assuming the duties of depositor*** or

manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued…" 15 U.S.C. § 77b(a)(4) (emphasis added).

30. In addition, the Securities Exchange Act of 1934 also sets forth the identical definition in the analogous portion. Section 3(a)(8) provides, in relevant part: "When used in this title, unless the context otherwise requires -- (4) the term "issuer" means every person who issues or proposes to issue any security; except that with respect to…collateral-trust certificates, or with respect to certificates of interest…***the term "issuer" means the person or persons performing the acts and assuming the duties of depositor*** or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued…" 15 U.S.C. § 78c(a)(8) (emphasis added).

31. To the same effect is the applicable federal regulation promulgated under the Securities Act. SEC Rule 191 states: "Definition of 'issuer' in Section 2(a)(4) of the Act in Relation to Asset-Backed Securities…***The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the "issuer" for purposes of asset-backed securities of that issuing entity***." 17 C.F.R. § 230.191 (emphasis added).

32. The applicable federal regulation promulgated under the Exchange Act is substantively identical. SEC Rule 3b-19 states: "***The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the "issuer" for purposes of the asset-back securities of that issuing entity.***" 17 C.F.R. § 240.3b-19 (emphasis added).

33. In contrast, an "issuing entity" is "the trust or other entity created at the direction of the sponsor or depositor that owns or holds the pool assets and in whose name the asset-backed securities supported or serviced by the pool assets are issued." 17 C.F.R. § 229.1101(f); *see also* Talcott J. Franklin & Thomas F. Nealon III, *Mortgage and Asset Backed Securities*

Litigation Handbook Appendix A (2011) (stating in definition of "Depositor" that "the Depositor is considered the statutory issuer of CMBS, although technically CMBS are issued by the Trust").

34. In sum, Boilermakers Claims satisfy each prong of section 510(b) of the Bankruptcy Code and must be subordinated because: (a) the CMBS Securities that form the basis of Boilermakers Claims are "securities" under the Bankruptcy Code, (b) Boilermaker Claims "arise from" Boilermakers' purchase of the CMBS Securities and (c) the CMBS Securities are securities "of the Debtors." Thus, to the extent, if any, that Boilermakers has valid securities or related claims against the Debtors, those claims must be subordinated to general unsecured claims.

RESERVATION OF RIGHTS

35. The Debtors reserve all their rights to object on any basis to Boilermakers Claims as to which the Court does not grant the relief requested herein, including, without limitation, with respect to the timeliness of the claims raised by Boilermakers for the first time in its Response.

CONCLUSION

36. Pursuant to section 510(b) of the Bankruptcy Code, the Court must subordinate the Boilermakers Claims to general unsecured creditors because such claims arise from the purchase of securities of the Debtors.

New York, New York
Dated: December 21, 2012

/s/ Jonathan S. Henes

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Exhibit A

***WaMu* Hearing Transcript Dated May 7, 2012**

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229(MFW)

- x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- x

Case No.: 10-53420 (MFW)

WASHINGTON MUTUAL, INC. and

WMI INVESTMENT CORP.,

Plaintiff,

v.

PETER J. AND CANDANCE R. ZAK

LIVING TRUST OF 2001 U/D/O

AUGUST 31, 2001, ET AL.,

Defendant

- x

Adv. Proc. No.: 12-50422 (MFW)

WASHINGTON MUTUAL, INC.

Plaintiff,

v.

XL SPECIALTY INSURANCE COMPANY, et al.,

Defendants

- x

- x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

May 7, 2012

10:31 a.m.

B E F O R E :

HON MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR: BRANDON MCCARTHY

Debtors' Twenty-Third Omnibus (Substantive) Objection to Claims;

Debtors' Objection to Proof of Claim Filed by AT&T Corp.;

Debtors' Sixtieth Omnibus (Substantive) Objection to Claims;

Debtors' Motion to Estimate Maximum Amount of Certain Claims for Purposes of Establishing Reserves Under the Debtors' Confirmed Chapter 11 Plan;

Motion for a Protective Order for Claimants Al Brooks, Todd Baker, Deb Horvath, John McMurray, Tom Casey, and David Schneider Pursuant to Rule 26(c);

Motion of the Official Committee of Unsecured Creditors to Alter or Amend the Court's Opinion and Order Regarding Subordination of the Claim of Tranquility Master Fund, Ltd.;

Motion of Washington Mutual, Inc. for an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure, Approving Stipulation and Agreement By and Among Washington Mutual, Inc., JPMorgan Chase Bank, National Association and U.S. Bank, National Association, as Successor to Union Bank, N.A. Resolving Adversary Proceeding and Related Proofs of Claim;

Motion for an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Approving the Stipulation and Agreement Between Washington Mutual, Inc. and MSG Media Reducing and Allowing Proof of Claim Number 1841;

Application of (I) Wilmer Cutler Pickering Hale and Dorr, LLP, (II) Pachulski Stang Ziehl & Jones, LLP, and (III) Boies, Schiller & Flexner, LLP for Compensation for Services Rendered and Reimbursement of Expenses as Counsel to the Ad Hoc Group of WMB Senior Noteholders for the Period from the Petition Date Through the Effective Date;

Washington Mutual, Inc. and WMI Investment Corp. v. Peter J. and Candace R. Zak Living Trust of 2001 u/d/o August 31, 2001, et al. (Adversary Proceeding No. 10-53420);

Debtors' Seventy-First Omnibus (Substantive) Objection to Late Filed Claims;

Debtors' Seventy-Second Omnibus (Substantive) Objection to Claims;

Motion of Deutsche Bank Trust Company Americas in its capacities as Indenture Trustee and Guarantee Trustee of Two Series of WMB/CCB Subordinated Notes for Entry of an Order Allowing and Authorizing and Directing Payment of Its Claims for Fees and Expenses;

Motion of Law Debenture Trust Company of New York, in its capacity as Indenture Trustee, for Entry of an Order Partially Allowing and Liquidating Proof of Claim for Fees and Expenses Incurred from January 1, 2012 through and Including March 31, 2012;

Motion for an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Approving Stipulation and Agreement Between WMI Liquidating Trust and SPCP Group, LLC Reducing and Allowing Proof of Claim Number 4048;

Fourth Motion of Wells Fargo Bank, N.A., in its capacity as Successor Indenture Trustee and Successor Guarantee Trustee, for Entry of an Order Further Partially Liquidating and Allowing that Aspect of its Proof of Claim Relating to the Trustee's Fees and Expenses;

Fourth Motion of Wilmington Trust Company, in its capacity as Trust Preferred Trustee, for Entry of an Order Further Partially, Liquidating and Allowing Proofs of Claim for Fees and Expenses;

Fourth Motion of The Bank of New York Mellon Trust Company, N.A. in its capacity as Indenture Trustee, for Entry of an Order Further Partially Liquidating and Allowing Proof of Claim for Fees and Expenses;

Fourth Motion of Wilmington Trust Company, in its capacities as Indenture Trustee and Guarantee Trustee for Five Series of WMB/CCB Subordinated Notes, for Entry of an Order Liquidating and Allowing Proof of Claim for Fees and Expenses;

MBS Plaintiffs' Motion to Classify Claim as a Claim 12 Claim;

Debtors' Seventieth Omnibus (Substantive) Objection to Claims;

Debtors' Seventy-Third Omnibus (Substantive) Objection to Late-Filed Claims;

Debtors' Seventy-Fourth Omnibus (Substantive) Objection to Claims;

Motion of Examiner for Entry of Order (1) Discharging Examiner; (2) Approving Disposition of Documents; and (3) Granting Related Relief;

Motion of Gregory G. Camas to Extend Time to File Proof of Claim, Deeming Proof of Claim Timely Filed, and Classifying Claim as Class 12 Claim Under Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code;

MBS Plaintiffs' Motion for Order Certifying Class for Purposes of the Class Claim Pursuant to Fed. R. Civ. P. 23 and Fed. R. Bankr. P. 7023 and 9014(c);

Washington Mutual, Inc. v. XL Specialty Insurance Co., et al.;

Tenth Interim Fee Applications.

Transcribed by: Sherri L. Breach, CERT*D-397

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning.

MR. ROSEN: Good morning, Your Honor. Brian Rosen, Weil, Gotshal and Manges. With me is my partner, Adam Strochak and Michael Merchant from Richards, Layton and Finger. We're here on behalf of WMI Liquidating Trust, and I'm guess we'll assume the capacity later on for our own respective law firms, Your Honor.

With respect to the agenda, I think we pick up on Page 14, Item Number 11, Your Honor.

THE COURT: All right. Just -- just for the record I have had an opportunity to look at the Items 11-19 which were filed under certification of no objection.

MR. ROSEN: Yes.

THE COURT: And I had no problem with any of them and have entered the orders.

MR. ROSEN: Okay. Thank you, Your Honor. I think that will allow certain people in the courtroom to -- to leave, which would take us then up to, Your Honor, Item Number 20, which Your Honor -- actually, Your Honor, if we could skip to Item 21 just very briefly. There are two other claims on there, if we could get rid of the claims objections first.

THE COURT: That would be fine.

MR. ROSEN: Okay. Items 21 and 22, Your Honor, Item Number 21 is the seventieth omnibus objection. In this objection we sought to disallow sixty-three claims which had been subordinated to the level of preferred or common stock --

THE COURT: Could the operator mute the lines? Thank you.

MR. ROSEN: So pursuant to the confirmed and consummated plan, Your Honor, Classes 19 or 22, and these claims have been subordinated pursuant to orders granted -- granting the thirty-eighth through the forty-second omnibus objections as well as a few others such as the sixty-second omnibus objection.

And, Your Honor, as noted in the objection that we did file here, pursuant to the plan holders of equity interests are now to receive a distribution on account of such equity interests, but the claimants holding the claims on each to this seventieth omnibus have not provided any justification why they should recover any amounts in addition to their equity interests or with respect to the purchases of the equity in the case.

And even the few that have asserted anything beyond the mere value of those losses, Your Honor, from holdings have not provided any support for those assertions. So the debtors' respectfully request that the Court disallow

each of the claims on that Exhibit A, not because we wanted to get rid of their equity interests, Your Honor, but because we were seeking to avoid a duplicate recovery on behalf of those people that have previously filed these claims.

There were six responses, Your Honor, that the debtors' received on or before the deadline, and after that the debtors' submitted under certification of counsel an order which the claim -- excuse me -- the form of which would have removed all of those non-responding ones. And, Your Honor, the Court entered that proposed order on April 2nd. So that left us, then, with these six remaining claims.

And if I could just briefly go through those, Your Honor, for the record.

The first, and I apologize if I mispronounce the name, Mr. Timothy Nguyen and his is Claim Number 3921 for $100,000, and he said in his papers, "I invested on Washington Mutual for $100,000. All my retire savings have lost when WM was transferred to Chase. Could you help me to consider my situation? All my supporting documents were lost when I moved from California to Florida." There is nothing else attached to the pleading, Your Honor.

Additionally, 3922 of the following claim was filed by Nancy Nguyen. Again, almost the same exact

wording. "I invested on Washington Mutual for 22,000 all my retire savings have lost when WM was transferred to Chase. Could you help me to consider my situation? Thank you." She attaches nothing either, Your Honor.

Celia Lucente, Claim 3608, for $545,000 and change says, "I have had taxes withheld on compensation for w-pay" -- I'm assuming work -- "I have performed, but in PD, paid income I was paid in the form of stock. Supporting documentation of brokerage statements for the shares issued and corresponding W2s showing withholdings filed with the proof of claim." There was nothing else filed, Your Honor.

Helen Burleson Kelso, Claim 3236, for 9,750, she said in her response, "I oppose the disallowance of my claim that is subject to the objection. My claim was properly filed previously with the claims agent and all supporting documentation was included therewith. My claim was in order. See attached." There's nothing else to the response, Your Honor. The claim itself has only an account statement showing the November 20th, 2007 market value of her stock to be $9,750.

Ms. Adele Plotkin --

THE COURT: Well, didn't she also attach her stock certificate?

MR. ROSEN: I -- I believe she did. Yes, Your Honor.

THE COURT: Okay.

MR. ROSEN: Ms. Plotkin said in Claim 1431 and in her response, "I am an eighty-nine-year-old senior citizen and did attend a hearing on objection in 201."

THE COURT: Oh, I'm sorry. It's Ms. Plotkin who attached --

MR. ROSEN: I -- I think that's right, Your Honor.

THE COURT: Okay.

MR. ROSEN: She attaches a certificate of 553 shares. "But I'm not physically able to attend the hearing on 4/3/12. I do not understand why the debtors' do not consider any settlement to my proof of claim."

Mr. Armstrong, Claim Number 263 -- excuse me -- 2368 filed in the amount of 41,000 and change. This claim asserted that -- the claim arose out of personal injury and that was sufficient for his claim of damages. He said he is no longer a shareholder. His claim relates only to the personal losses "I suffered up to date of filing of this case and the value of my property which was taken by our government, and makes no mention of any equity interests I may have acquired or disposed of since that time."

Interestingly, Your Honor, when you look at his day trading, which he did attach, he bought a lot of things several days after the seizure, so -- to help pump up his claim. And we also noted that when you do -- he was a day

trader. There's a lot of buying and selling of his claim. We noted that his losses were only in the amount of around $9,000 from what he did buy and sell.

We did actually speak to him and try and get him to be part of the MBL settlement, but we noted that his -- his purchases actually were after the commencement -- or excuse me -- after the closing of the class period. He argues Fifth Amendment; that the FDIC should pay him for taking of the bank. He says the bank -- the FDIC told him, no. He should look here. Your Honor, he argues -- he tries to reargue the subordination issue. We have been unable to come up with any reason as to why this should be paid, Your Honor.

I do have, in the courtroom, Your Honor, Mr. Maciel. Mr. Maciel and others have testified before as to the effects of WMI versus WMB, the claims process, et cetera, and I could tender or proffer Mr. Maciel at this time if the Court thinks it would be helpful.

THE COURT: All right. You may.

MR. ROSEN: And, Your Honor, with you already having granted several of these, I will just try and skip over and go to the ones that are relevant.

THE COURT: Thank you.

MR. ROSEN: Because it would be applicable, I think, to the seven -- perhaps the seventy-three as well.

Your Honor, Mr. Maciel is a senior director with Alvarez and Marsal. He was formally the chief financial officer of Washington Mutual, Inc. and WMI Investment Corp, and he's currently the chief financial officer for the WMI Liquidating Trust. He's present in the courtroom today and I make this proffer on his behalf, Your Honor.

He would testify that as the CFO of the debtors he was one of the persons responsible for overseeing the claims reconciliation and objection process in these Chapter 11 cases. He would testify that in preparation for filing the omnibus claims objections, each of the claims at issue was carefully reviewed and analyzed in good faith using due diligence by the appropriate personnel working under his direction and/or supervision.

He would further testify that he has reviewed the omnibus claims objections and the exhibits and is familiar with the information contained therein.

With respect to the seventieth omnibus one, those were the six responses we were just referring to, Your Honor, Mr. Maciel would testify that each of the sixty-three claims have been previously objected to and been disposed of.

He would testify that pursuant to the seventh amended plan, holders of equity interest have received distributions on account of such equity interests, but the

claimants holding the claims in the seventieth have not provided any justification why they should recover amounts in addition to their equity interests or with respect to their purchases of WMI equity.

And even the few claimants that have asserted anything beyond the mere value of their losses from the holdings of equity have not provided any support for such assertions, including in their responses to the objection.

He would testify that by -- excuse me -- that by this objection the debtors are not seeking to disallow any equity interest held by such claimants, but rather such claimants should not recover additional amounts with respect to the purchases of the equity.

That would be his testimony solely with respect to the seventieth, Your Honor.

Your Honor, if you would like I could then proceed with what he would say with respect to the seventy-third or we could deal with that later.

THE COURT: Well, with respect to those who sold their shares, and I -- I guess it's Mr. Armstrong is the only one --

MR. ROSEN: Right.

THE COURT: -- who sold his shares, he is not getting a distribution as a shareholder.

MR. ROSEN: No, Your Honor.

THE COURT: Why is he not entitled to a distribution -- a distribution as a subordinated creditor for his losses?

MR. ROSEN: Your Honor, we haven't seen any evidence as to why he should be entitled to it. We've asked him to come forward and show us what that evidence would be. Obviously, he has made allegations in his pleadings with respect to directors and officers, but we haven't seen anything beyond that, Your Honor. He is just claiming gross mismanagement on the part of those directors and officers in allowing the bank to be seized by the government. And then he -- as I said, he turned around and said, my Fifth Amendment rights; the government took it; the government should pay me for the taking of my stock, which at this point only the $9,000.

So, Your Honor, we haven't seen anything from Mr. Armstrong that would warrant anything beyond this. If Mr. Armstrong would step forward and provide us with some sort of evidence as to what we perceive to be the nine-thousand-dollar differential between the day trading bought and selling, we would, obviously, take a serious look at it.

THE COURT: All right. Well, I believe Mr. Armstrong is on the line.

Mr. Armstrong?

MR. ARMSTRONG: Yes. Can you hear me?

THE COURT: We can hear you.

MR. ARMSTRONG: Okay. Good.

First, thank you for taking the time today. And I guess I need to get clarification on something that counsel said because they have not contacted me at all or discussed my claim in any form or fashion. So --

THE COURT: Well, just tell me, what is the basis for your claim for damages?

MR. ARMSTRONG: It's in two parts. It's -- the first is actual, out-of-pocket losses from Washington Mutual, which is the $8,305.19.

And I'm -- I'm filing an open claim and not just an equity interest because I believe that the management of the company breached a legal duty and grossly mismanaged my assets, you know, to cause me those losses. I believe they have a legal responsibility for that.

THE COURT: And did you provide a calculation of your actual losses as part --

MR. ARMSTRONG: Yes --

THE COURT: And where --

MR. ARMSTRONG: -- I did.

THE COURT: -- is that?

MR. ARMSTRONG: With my original claim.

MR. ROSEN: Your Honor --

THE COURT: Do you have the --

MR. ROSEN: -- if I could approach, I'll help --

THE COURT: Yeah. Please hand up the original claim.

All right. I'm looking at Exhibit A to your proof of claim and that's the $9,000.

MR. ARMSTRONG: Yeah. That's the summary of it. Correct. And then all the individual trade confirmations follow in Exhibit B.

THE COURT: I have those.

MR. ARMSTRONG: So Exhibits A and B to the claim are the, you know, detailed support for that eight-thousand-three-hundred-dollar number.

THE COURT: All right. And your -- you have another claim you assert you're entitled to?

MR. ARMSTRONG: Yeah. The second part of the claim is the value of the 3,800 shares that I owned as of the petition date.

THE COURT: And --

MR. ARMSTRONG: But, you know, my cost on those is not included in the $8,300.

THE COURT: But you sold those --

MR. ARMSTRONG: The --

THE COURT: -- you sold those shares after the bankruptcy.

MR. ARMSTRONG: After the bankruptcy, yes, ma'am.

MR. ROSEN: Your Honor, it's our understanding, and -- and Mr. Armstrong can correct me if I'm wrong, but he -- he's asserting that he's entitled to an imputed loss of $33,000 because he thinks that the fair value of the stocks should have been $8.75 per share which was the value that TPG paid in April of 2008. So he has grossed up the amount of his claim.

MR. ARMSTRONG: Yes. I -- I used TPG's investment amount.

MR. ROSEN: Even though he didn't buy it at that level.

MR. ARMSTRONG: Correct. But I've since found out that -- and as I stated in my original claim, I've -- I felt that was probably a very conservative estimate of the value of the -- of the shares. And as it turns out, it was a very conservative estimate and I provided additional information in my response to the seventieth objection that shows the FDIC itself --

THE COURT: Well --

MR. ARMSTRONG: -- valuing the shares at $15.50 a piece after -- after the seizure.

THE COURT: All right. Well, as -- as a legal matter, I'm going to disallow any claim for stock you sold after the bankruptcy date. That was a voluntary decision made by you and I don't think that entitles you to anything

from this estate.

MR. ARMSTRONG: Okay. Even if the management of the company caused the value of my asset to basically disappear or vanish --

THE COURT: Well --

MR. ARMSTRONG: -- prior to the petition date or --

THE COURT: Well --

MR. ARMSTRONG: I mean, that's really the basis of my whole claim; that I owned -- that I had property of significant value and because of the management of the company, that value was wiped out.

THE COURT: Well, but -- but had you held your claim, you would have a claim against the estate for your stock, and you did not. I -- I don't think that anything that occurred after the bankruptcy entitles you to a claim for stock that you voluntarily sold.

MR. ARMSTRONG: Oh, I agree with that. But -- but my claim is for the property that I held prior to the bankruptcy.

THE COURT: Well, but I think that's incorporated in your nine-thousand-dollar calculation.

MR. ARMSTRONG: Actually, no. The $9,000 or $8,300, it was actual losses that I had incurred as the value of the stock went down. That does not consider the

value of the 3,800 shares that I still held as of the petition date, if that makes any sense.

THE COURT: No. I understand.

MR. ARMSTRONG: Okay.

THE COURT: Well, but to the extent that the -- well, let me hear the debtors' argument on this. I mean, I'm struggling to see what the --

MR. ROSEN: On the -- on the eighty-three-hundred piece, Your Honor?

THE COURT: -- the issue is. Yeah.

MR. ROSEN: Your Honor, on the eighty-three-hundred piece --

MR. ARMSTRONG: No. She's -- she's talking about the twenty --

THE COURT: The two --

MR. ARMSTRONG: -- the 33,000 and twenty-two --

THE COURT: Yeah. The 2,000 --

MR. ARMSTRONG: -- portion in the claim.

THE COURT: The losses on the 2,000 shares held as of the petition date.

MR. ARMSTRONG: Yeah. The 3,800 shares I held as of the petition date. My claim for the value of those is $33,022.

MR. ROSEN: Your Honor, as I indicated, we tried to break this down into, when we looked at all of the buying

and selling and understanding what he -- what Mr. Armstrong bought the shares of stock, and if you noted he was buying them on the same day he was selling them.

And we -- we added up and he agrees that there was about an $8,305 in losses there. This is for the gross-up, though, that he's referring to, this 8. -- times the TPG value. I honestly -- Your Honor, I'm at a loss to understand why there is a relationship back to what TPG paid and he's focusing on the FDIC's papers in some subsequent filing that the FDIC made somewhere to say, geez, look, there was value in that stock.

We -- I honestly -- Your Honor, I have a hard time understanding it. I don't understand it and I don't see what the relationship is back to the estate. If there is, in fact, a claim that we should be talking about, it should be limited to the $8,300, and at that point, then, if Mr. Armstrong wants to come forward and present evidence as to why the $8,300 qualifies a subordinated claim, then I think that's something, Your Honor, that we can discuss with the Court and, if necessary, litigate and -- and have the Court decide.

But just to make a reference to say there was gross mismanagement on the part of the directors and officers and, therefore, pay me $8,300 or pay me for this impeded value of $33,000 in addition to that, Your Honor,

we're hard-pressed to understand how it's right. He chose to do what he did. He chose to sell the stock. He chose to quantify his loss at the $8,300.

THE COURT: Yeah. Why isn't that correct?

(No verbal response)

THE COURT: Mr. Armstrong.

MR. ARMSTRONG: Oh, I'm sorry. I thought you were asking him.

THE COURT: No. I'm asking you why isn't counsel for the debtor correct?

MR. ARMSTRONG: Well, as far as the eight-thousand-three-hundred-dollar out of pocket losses is concerned, he is correct. And I can see -- the way the question is by alleging that that was a loss caused by a breach of a legal duty by the former management of the company, is it -- is it a legal and reliable claim. If it is, then I would say that it's a -- you know, it's a claim which precedes the petition date and they've got to pay it or treat it, handle it in -- in the estate, just like any other claim. I -- based on what I've learned, I believe that that would be subordinating, the level of co-owned equity.

THE COURT: Yes.

MR. ARMSTRONG: And the fact that I sold the shares afterwards, in my mind, is really irrelevant because

what my claim is for is, you know, pre-petition losses.

THE COURT: Well, I think the debtor is willing to concede $8,300 in out of pocket losses.

MR. ROSEN: Well, Your Honor, I -- I think --

THE COURT: As a calculation.

MR. ROSEN: As a calculation. That's correct. By no means are we conceding liability.

MR. ARMSTRONG: By no means what? Say -- say again, please?

THE COURT: They're not conceding that you lost this money because of any bad acts by the debtors or its --

MR. ARMSTRONG: Oh, okay. Okay. I guess that's for you to decide then. I really don't know what the -- you know, the legal standard is for proving gross mismanagement. If the fact that we're talking today isn't proof enough, then I don't -- you know, I really don't know what else I can provide. I mean, the bank was a hundred-and-something-year-old bank that survived the Great Depression. It was the sixth largest bank in the country and now we're sitting in a bankruptcy court arguing over an eight-thousand-dollar claim.

THE COURT: Well, the problem --

MR. ARMSTRONG: In my mind, that -- that's evidence of mismanagement. But --

THE COURT: Well, I think it's not quite enough

and there are any number of reasons why the stock might have lost value. I mean, I think you have to prove a little bit more than that to prove a loss, even a subordinated loss.

MR. ROSEN: Your Honor, if I could make a suggestion. If we could modify the order to carve Mr. Armstrong's claim out of it and then allow Mr. Armstrong an opportunity to submit some evidence, as the Court did previously with some people who had some of the similar types of assertions that he has now, and then we, perhaps, have a hearing set in the future for the eighty-three-hundred-dollar piece.

THE COURT: All right. I'm willing to allow that. Mr. Armstrong, I suggest that you talk with counsel for the debtor regarding what proof you can come forward with. Okay.

MR. ARMSTRONG: Okay. I'll -- I'll -- I'll gladly do that.

THE COURT: All right. I think the other claims are -- are different from yours and I agree that it appears that all they are asserting is really claims for shares, their share ownership.

MR. ROSEN: Right.

MR. ARMSTRONG: Right.

THE COURT: All right. So we'll carve out Mr. Armstrong.

MR. ARMSTRONG: Okay. My biggest concern, honestly, is -- is the Fifth Amendment issue.

THE COURT: Well, you understand that -- that the taking was by the government, so am I correct that you're asserting a claim against the government for taking of your property, for the seizure of the bank?

MR. ARMSTRONG: I believe -- my own -- my own personal belief is that the government is responsible for compensating the owners of that bank. Yes. Unfortunately, I've had a similar situation on -- with -- on another investment of mine and I filed a claim directly with the FDIC. They called it a third party claim, kicked it back to me and said, go talk to the holding company, which is what I'm doing here. I don't understand the logic behind that, but that is what I was instructed. So --

THE COURT: Well, I'm -- I'm prepared to find that you do not have a Fifth Amendment claim against the debtor.

MR. ARMSTRONG: Okay.

THE COURT: I'll disallow that portion.

MR. ARMSTRONG: Would it be -- would it be out of your venue, if that's the right word, to give me a ruling that we do have a Fifth Amendment claim against the government?

THE COURT: Yeah. I -- that's not -- I don't have jurisdiction or venue to decide that.

MR. ARMSTRONG: That's what I was afraid of. Okay. Very good.

THE COURT: All right.

MR. ARMSTRONG: If the debtors will just contact me on this other, then we'll discuss it.

MR. ROSEN: We will, Your Honor. And thank you, Mr. Armstrong.

MR. ARMSTRONG: Thank you all.

MR. ROSEN: Your Honor, that takes us to the seventy-third omnibus objection, which is Item 22 on the agenda.

In this objection, Your Honor, we objected to nine claims on substantive grounds. And Mr. Maciel would testify that each of the proofs of claims listed in this objection had also been previously objected to and disallowed on the basis that they were late filed. But, Your Honor, if you recall, pursuant to the plan we -- we gave them new life.

THE COURT: Yes.

MR. ROSEN: Mr. Maciel would testify that the debtors have determined that each such claim has been asserted by a party to which the debtors have no legal obligation. He would testify that with respect to certain of these claims, the claimant has attached only an invoice and no case identifying either of the debtors as the recipient of such services, but has not attached a contract

from which the claim arises or any other supporting documentation.

Nonetheless, the debtors searched the records for any contract that might exist between them and the claimants relating to such services without success, and nothing in the debtors' books and records indicated a liability owed to such claimant.

The remainder of the seventy-third omnibus objection claims are miscellaneous claims that improperly seek recovery against the debtors because they arise from mortgages issued by WMB, the bank, and held by the claimants.

Mr. Maciel would testify that the only two responses to this objection came from holders of mortgage claims. With respect to such claims, Mr. Maciel would testify that during the period implicated by these claims WMI was a thrift-holding company that never directly engaged in any of the mortgage operations or related activities implicated by such claims. Specifically, WMI never directly originated or serviced any mortgage loan anywhere in the United States or elsewhere. As such, these claims seek a recovery for conduct that is attributable to WMI.

Mr. Maciel would further testify that neither of the responses provides any justification for why the debtor -- either of the debtors should be liable for the claims

arising from the mortgages issued by WMB.

That -- that would be his testimony today, Your Honor.

THE COURT: All right. Is there anybody here for either the Lloyds or the Soucek family trust?

MR. LLOYD: Mike Lloyd, I'm here.

THE COURT: All right. Do you want to respond to the debtors' testimony that there is no claim against the debtor and, rather, your claim is against the bank?

MR. LLOYD: Well, I'm not agreeing with them as those separate entities and I don't think the Court did either. Already I think Your Honor has ruled that they acted a single control or single person controlled that entity where WMI, WMB were all one in the same. They advertised that on the internet. They even acted in the office of thrift which is responsible for mortgages seized their company. The announcements that were made on the internet certainly -- and the press certainly do not differentiate between WMI, WMB or any other groups that they may have -- have put together.

So it seems like a share game for their convenience to me. But they're objecting and saying that they had no responsibility toward those of us that -- while they owned -- owned controlling interests in WMB and they directed WMB and all their executive team controlled WMB,

that just doesn't seem like there's any -- anything other than a share game. Let's play hide behind the corporate vale.

And so that -- in that regard, in my opinion, the WMI is Washington Mutual and they are related and all connected. They've harbored the same logo. They've had the same billing addresses. When we sent payments in, it was sent -- payments were sent to WaMu. It wasn't sent to WMB. It wasn't sent to anything other than WaMu. So that seems to, I guess, make their -- their claim that WMI is separate from WaMu disappear.

THE COURT: Debtor wish to reply?

MR. ROSEN: Your Honor, we -- we've dealt with this very issue several times over. And contrary to what Mr. Lloyd says, these are the wrong party claims that are exactly the kind that the Court has disallowed pursuant to the nineteenth, the twenty-first, the sixty-third, and sixty-fifth omnibus objections where the Court found the distinction between WMI and Washington Mutual Bank.

WMI observed all corporate formalities, Your Honor, with WMB. They were separate entities. WMI did none of these operations that Mr. Lloyd is referring to. They were either done by Washington Mutual Bank or by Washington Mutual Bank's subsidiary that did the origination of the mortgages.

With respect to where payments are made, I don't know, but I doubt that they went to the corporate offices of Washington Mutual, Inc.

Your Honor, for this reason we would just reassert the same objection that the Court has already upheld several times over, to point out the wrong party nature of this and the separateness of Washington Mutual, Inc. and Washington Mutual Bank. We apologize that there were these issues, but, unfortunately, they are separate entities and there is no claim against the debtors themselves.

THE COURT: Well, I agree --

MR. LLOYD: Can I --

THE COURT: Go ahead, Mr. Lloyd.

MR. LLOYD: I -- I was just going to say that's nice if we could just waive the magic wand and tell everybody that let's make a claim disappear. But there's -- there's way too many egregious things that are going on here that -- that they're objecting to my claim hiding under the Washington Mutual Bank or Washington Mutual -- WMI and -- and saying that WMI is not WMB. Well, the guy who was the president of WMI wanted to be the Wal-Mart of banks. The only parts that they forgot is the whole customer service thing, and when these guys have -- have the banking is their business and they are -- can't seem to get a deposit put in the right account and they cause damage to somebody because

of breach of performance, then this -- this claim cannot be dismissed according -- you know, I'm not a lawyer, but I'm simply reading that, you know, that when there is impropriety that goes on, you just can't get rid of a claim, misconduct alleged. You just can't throw a claim out.

So WMI, WMB are one in the same from the public's eyes, from the operational eyes, and -- of this -- this whole process. And it's nice that they're saving that and I appreciate that they've got someone there that used to work for Washington Mutual that's now being paid for somebody else making testimony. But, quite frankly, I think he's conflicted and not capable of making a decision for everyone else.

This -- they're paying lawyers' fees that -- that are far in excess of what -- what this claim is, not that the amounts matter, but to me it seems that we're letting Washington Mutual who declares bankruptcy escape without having to pay any fines or fees. And obviously there's -- there's no question that -- that they couldn't put a simple deposit into the right account. There's no question of breach of performance. They admit it in a letter which has been submitted to you guys. There's no question that they attempted to foreclose on a mortgage that they did not own and -- and in doing so damaged my personal and professional reputation, not to mention my -- my financial situation.

So, you know, all of that's fine and dandy that -- that they want to separate out and hide behind the corporate veil and play the shell game, but that's neither justice nor fairness nor -- nor in agreement with what the Court's already ruled.

THE COURT: Well --

MR. LLOYD: And Tranquility you -- Your Honor was smart enough to separate out the way that it meant and you were able to judge that these guys were one singly controlled entity. So in my mind that -- that should apply here and that order should stand and this claim should be paid.

THE COURT: Well, the Tranquility decision didn't find as a matter of law or of fact that the corporate veil should be pierced. I simply held that they stated a claim; that if they were able to prove those facts, they stated a claim. However, I have not ruled at any point that anybody has proven what you're suggesting, which is piercing the corporate veil. And -- and the burden of proof is on the creditor who is asserting that.

In this country, corporate entities are separate legal entities, and in the absence of proving why they should be ignored, the corporate entity must be acknowledged. So the burden --

MR. LLOYD: I --

THE COURT: -- the burden of proof is on you to prove it and I'm not hearing any proof. I think it's clear that you --

MR. LLOYD: Okay.

THE COURT: -- dealt with the bank and the actions of which you complain were those of the bank, not its parent, Washington Mutual, Inc.

So I -- I do have to sustain the objection to your claim.

MR. LLOYD: Well, Your Honor, I'm reading just from Wikipedia from news reports from the Wall Street Journal and each of those defines WaMu as one singular entity. They don't separate out that the -- the different entities that are Washington Mutual, et al. They -- they -- they indicate operating under the same WaMu logo, the same executive addresses, the same leadership team, the same executive committee. All of that is identical.

And -- and, of course, in the Tranquility order it says, you know, prior to filing, WMI had directly or indirectly owned all of the outstanding capital stock of Washington Mutual Bank, WMB. WMB's subsidiaries, including Washington Mutual Asset Corp and WaMu Capital Corp. You know, from -- from a layperson's perspective, from somebody who is being serviced by Washington Mutual, you know, it's -- it's one in the same entity. And while legally that

might not be true, this -- this would -- this would allow for illegalities and breach of performance to go on untethered, unchecked --

THE COURT: Now -- now --

MR. LLOYD: -- and --

THE COURT: -- Mr. Lloyd, Mr. Lloyd, you have a claim against the bank.

MR. LLOYD: Okay.

THE COURT: All right. But there's a difference between saying you have a claim against the bank for illegalities and a claim against Washington Mutual, Inc. And I'm hearing no proof. You know, something stated in the press that a one trade name is used to refer to more than one entity is not proof that the entities were not two separate legal corporations that operated as such.

MR. LLOYD: And I'm with you, Your Honor, on that. I mean, I understand how -- how something about the corporations and that's the way to proceed. However, my mortgage, when I took out the application, was with First Trust and the bundling that occurred to allow First Trust Mortgage to sell my mortgage to Washington Mutual, all I got in the mail was a notice that said, pay -- pay to WaMu, We're now -- your payments are now going to Washington Mutual. It didn't say Washington Mutual Bank. It didn't say Washington Mutual, Inc. It just says, WaMu, that's --

you know, it's got their letterhead on it, their logo.

So --

THE COURT: All right.

MR. LLOYD: -- what happened was --

THE COURT: But your transaction was with a bank. It was not with a corporate holding company.

MR. LLOYD: Well, if the corporate holding company controlled the assets and everything else from the bank, it would seem to me that -- that they are still one in the same.

THE COURT: Well, it -- it's -- quite frankly, your argument is not enough for me to find that the corporate veil should be pierced. They were two separate corporations and I think I have to deny your claim. Your claim is against the bank, not against this corporate entity.

MR. ROSEN: Your Honor, may I approach?

MR. LLOYD: When -- Your Honor, when we called to complain with customer service and we escalated the customer service issue, they sent me to what was the executive team at Washington Mutual. It wasn't -- it wasn't Washington Mutual Bank. It was the executive team with Mr. Carney in charge. And now the young lady's name, Ms. Felicia Washington, who communicated with me, she was at the corporate offices in -- out in -- on the west coast.

And so, you know, they then operated at that point as one single control entity.

THE COURT: Well, I -- what -- your argument is not sufficient proof that they did not act as separate entities. And I am going to overrule -- excuse me -- sustain the objection to your claim.

MR. LLOYD: I -- I like overrule better.

(Laughter)

THE COURT: I know, but I'm -- I'm overruling your claim.

MR. ROSEN: Your Honor, may --

MR. LLOYD: Okay. Does that -- and then if you're overruling my claim, does that allow me then to pursue the bank?

THE COURT: You always have --

MR. LLOYD: Because, you know, we -- we were deemed -- we were deemed valid claimants by being on KCC's list and I guess the Court's have had in the past, if that's the case, that we're valid claimants because we're on the KCC list of creditors. So it would seem to me that -- that if you don't separate -- if you -- if you overrule based on -- or sustain the objection based on the separate entities, then we can't hardly be left out because of being left on the creditor list. And as a member of the creditor list, then they're deemed to be valid creditors. I'm just reading

what -- what they say in the different cases that have occurred. Not being a lawyer, of course, that probably puts me at a handicap, but --

THE COURT: All right. Mr. Rosen -- Mr. Rosen.

MR. ROSEN: Yeah. Sir, the KCC list was merely just a registry which sets forth everybody that filed a claim against the estate and what the status is.

To the extent that you have a claim against the estate, your obligation is to file it with the FDIC as receiver for the bank itself.

THE COURT: To the extent you have a claim against the bank.

MR. ROSEN: The bank. Yes.

THE COURT: Not the estate.

MR. ROSEN: I'm sorry. The receivership.

THE COURT: Yeah.

MR. ROSEN: You can still file it against the -- with the FDIC as receiver.

THE COURT: Yeah. Any claim --

MR. LLOYD: Okay.

THE COURT: -- filed in this case is being disallowed because it's only a claim against WMI or the other debtors.

MR. ROSEN: May I approach, Your Honor?

THE COURT: Yes.

All right. I'll disallow the claims, then, and sustain the objection.

MR. LLOYD: Your Honor, I -- I object to the objection and the sustaining of the objection, and -- and I think that it's probably a miscarriage of justice for me to be not allowed this claim simply because there's -- there's way too many avenues to approach this that would suggest that these guys are escaping with breach of performance that rises to payment and that have damaged us, and now they get to walk away from it.

THE COURT: All right. I've -- I've sustained the objection to your claim and I am disallowing your claim.

MR. LLOYD: Okay. And does -- does that mean that I cannot pursue the bank?

THE COURT: To the extent you have a claim against the bank, I am making no ruling on any claim you may have against the bank.

MR. LLOYD: Okay. And so does that also mean that -- that you're -- that we're not hindered by this -- this objection or this disallowance and that we can pursue FDIC and that sort of thing?

MR. ROSEN: In the receivership.

THE COURT: I'm -- I'm not making any ruling as to any claim you have against the FDIC as receiver of the bank.

MR. LLOYD: Okay.

THE COURT: All right.

MR. ROSEN: Thank you, Your Honor.

That -- that takes us to Item Number 23, which is the seventy-fourth omnibus objection. In this one, Your Honor, we objected to a number of claims on substantive grounds. We objected to two claims of vendors that were for services provided to the bank branches pursuant to contracts between the claimants and Washington Mutual Bank. JPMorgan Chase actually paid such claimants in full for these claims.

Additionally, we objected to one municipal claim for fines levied on a Washington Mutual Bank branch just as we had previously filed objections to similar claims.

Additionally, Your Honor, we sought to reduce and allow two claims of former employees. The claimants agreed with us as to the amount of such claims, but were unable to amend their claims prior to the start of the confirmation hearing, and pursuant to the confirmation order filed on February 16th, no claims can be filed, either newly asserted claims or claims amending the previously filed ones.

Finally, there were four claims arising from Washington Mutual Bank subordinated notes. These claims were filed long after the debtors had filed the fifty-fifty omnibus objection in November 2010, so these claims were not included in that objection. And by this objection, we

simply seek the same treatment for those claims; that they would be placed in Class 17(b) pursuant to the plan.

There was one response by the deadline of April 2nd, and that was filed by Marlene Carr on account of her Washington Mutual Bank subordinated note claim. And in that, Your Honor, Ms. Carr stated "I bought this bond with the understanding that Washington Mutual Bank was a thriving financial institution. I feel I am entitled to a financial settlement for the bond now showing nearly valueless on my investment statement. I have limited financial means and having my ten-thousand-dollar bond investment drop in value to zero greatly impacts my financial well-being."

Unfortunately, Your Honor, there was nothing in this response that justifies why this claim should be in anything other than in Class 17(b) with the other Washington Mutual Bank subordinated note claims. So we would ask the Court to deny Ms. Carr's objection and grant the seventy-fourth omnibus objection as we filed it, Your Honor.

THE COURT: Is there anyone here for Ms. Carr?

(No verbal response)

THE COURT: All right. I will sustain the objection.

MR. ROSEN: May I approach, Your Honor?

THE COURT: You may.

MR. ROSEN: Your Honor, next is Item 24 which is

the examiner's motion for an order discharging the examiner, approving disposition of documents, and granting related relief.

Mr. Sewell is here in the courtroom on behalf of the examiner. Your Honor, Mr. Sewell and I did have discussions prior -- last week with respect to this relief being requested. Specifically, we pointed out that the litigation subcommittee is now getting up to speed as the subcommittee of the trust itself, and they may have some questions or at least want to discuss some of these documents or at least get their eyes on some of these documents.

And we have worked out an understanding with Mr. Sewell that there would be a thirty-day lag time; specifically, Your Honor, that I think we were the only party that did raise any points -- no, there were others?

MR. SEWELL: I think there's one objection.

MR. ROSEN: Oh, there's one objection. With respect to our point, Your Honor, we had said that as long as there was a thirty-day period for the litigation subcommittee to raise an issue, that that would come back to the Court. The examiner agreed to that.

I'll now hand it over to Mr. Sewell to address the other objection.

THE COURT: All right.

MR. SEWELL: Good morning, Your Honor. Henry Sewell, McKenna Long Aldridge representing the examiner. I have Kate Stickles from Cole Schotz with me today as well.

Your Honor, we have filed with the Court a motion to formally discharge the examiner from his service in this case. We have requested relief that I believe is consistent with relief granted to examiners. In fact, I think the order that we requested is pretty typical both in this district as well as the Southern District of New York in terms of the relief granted to an examiner at the close of an examination.

Your Honor will recall, we were appointed in the summer of 2010. We were asked to complete a report in a very short time frame. We took one very short extension. We completed our report and filed a three-hundred-and-sixty-page report with exhibits with this Court on November the 1st. That report is posted still on our website as publicly available. The exhibits are publicly available and we'll leave the report up probably for some period of time to come if anyone wants to -- to look at it.

We opted to wait to seek a formal discharge given the significance of the issues raised in our report, the fact the case was still ongoing. We did not seek a formal discharge. We did not believe it would be appropriate to do so until the case was resolved. Now that the case is

essentially resolved we have filed our motion for discharge and we're essentially, Your Honor, seeking three forms of relief.

We are requesting, obviously, that the examiner be formally discharged.

We are requesting that we be permitted and authorized to dispose of, destroy, or return documents that we obtained during the course of our examination subject to the carve out from Mr. Rosen and I have taken our order and made some changes to it that I believe Mr. Rosen is -- is happy with.

We seek relief from this Court to prevent third parties from seeking discovery from the examiner without first coming to Your Honor to determine whether discovery is truly necessary. In prior cases, Your Honor, Mr. -- Mr. Hothberg (ph) has been the examiner in two other cases and in each of those cases the examiner sometimes is viewed as a free source of discovery. So we request as part of the discharge that we be relieved from any obligation to respond to discovery. If there is something that someone truly needs from the examiner, they can come to this Court and ask for this Court to determine whether or not discovery should be had from the examiner.

We request an exculpation of the examiner and his professionals; that is, a release from any claims that might

be made against the examiner in connection with the report that was filed and the conclusions that were reached in the report. We believe, also, that that's necessary and appropriate in the circumstances of -- of this case in particular.

And, finally, Your Honor, we have filed a final application for compensation. And I apologize to Your Honor. I think I might have gotten a little bit ahead of everybody in this case. I did -- we were following the case somewhat, but not in detail, and so at the time I filed that I did not understand there was going to be a final fee process that all the parties were going to participate in. I'm happy if Your Honor wants to defer ruling on that until Your Honor hears the other final applications. That -- that is certainly more than acceptable to us.

But just by way of reports, Your Honor, in our final fee application we are requesting, essentially, final approval of fees and expenses of $6.2 million, approximately 5.9 million of that represented the fees necessary to complete the report. That sum includes $23,907 which has not yet been paid, but we seek allowance of on an interim basis and payment on an interim basis, and as -- as well as the 23,000 includes a ten-thousand-dollar allowance for the clean-up work necessary to have this motion approved and to deal with any -- any objections or issues which come up.

Other than Mr. Rosen's issue which -- which I think we've resolved, there was a formal written objection filed by an individual named Mr. James Berg. Mr. Berg filed a written pleading with this Court objecting to the discharge of the examiner. I believe the objection -- the substance of the objection is that Mr. Berg disagrees with the conclusions and recommendations we made in our report. We obviously stand by those conclusions. We believe they were thoroughly researched, well-founded and -- and I believe they've been largely sustained by this Court during the course of this case.

However, despite that, the fact that he might disagree with our conclusions is not a basis to deny the examiner discharge as we requested in this case. So we would request that that objection be overruled and -- and our order, as we've agreed to the modification with Mr. Rosen, be modified -- be granted as well.

THE COURT: All right. Mr. Berg. Is Mr. Berg on the line?

(No verbal response)

THE COURT: All right. Well, I'm prepared to overrule Mr. Berg's objection. I think not only is it simply that he disagrees with the report, but I think it is rehashing arguments made by Mr. Berg at the confirmation hearing.

And I agree it is not a basis --

MR. BERG: Hello.

THE COURT: Yes. Mr. Berg?

MR. BERG: Oh, there we are. I'm sorry. I do not object to the examiner's discharge. I don't know why I was offline there for a bit. My main -- my main issues are regarding the exculpation and the destruction of documents is the -- is the large one for me. That -- at this point we -- I mean, I've got a list of documents I expected to feature prominently in the examiner's report and they did not. That -- that is in large part why I disagree with the -- I mean, he is -- he has painted it basically as me disagreeing with the conclusions.

What I -- what my argument is more along the lines of not so much disagreeing with the conclusions as there are documents that -- that I know of that are in -- for example, the PF -- PSI report that I believe should have been considered by the examiner, should have been included in his report and that paint an entirely different picture than what he -- what he addressed in his report.

THE COURT: Well, then isn't that simply disagreeing with the report and the conclusions of the report?

MR. BERG: I -- I can -- I guess to an extent that might be true. I -- let me -- let me revise my train of

thought. I've -- you just completely derailed it. All right. Assuming we do that, my argument basically was to hold off on the destruction of documents. We've got -- let's see here, skip way ahead.

Basically, if the documents are destroyed, we have no way of knowing whether the examiner holds other documents which might indicate misconduct on the part of the examiner. That -- that is my primary concern right there. If they're destroyed, obviously, the way -- if he operates in his own self-interest he's going to destroy anything that might essentially be damaging to him and retain anything that -- that could be -- could support his cause if there is any later litigation regarding potential misconduct. And if he -- if he destroys these documents we have no way of knowing whether -- whether any of the other documents he holds justify misconduct.

MR. SEWELL: Your Honor, may I address the issue of the documents for a second? I -- I think I can alleviate whatever concern might be there.

The vast majority of documents that we obtained during the course of our investigation were -- were either from the database maintained by Weil Gotshal or were subsequently deposited into that database as we conducted our investigation. So, essentially, the -- you know, ninety percent of what we have is duplicative of what the debtor

already has.

We did obtain some documents, pretty limited documents from third parties. We entered into confidentiality agreements with those third parties which obligated us to either destroy those or return those to those third parties. So, in essence, we would be complying with our obligations to those third parties.

We filed -- Your Honor, many of our documents that we relied upon were attached to the report and are still available. You can look at the exhibits that are attached to the report online and pull down PDFs of those. So the reality is that the documents that we are getting rid of, basically, are primarily either extra copies of what the debtor already has or they're documents that we have obligations with respect to the third parties to -- to destroy or return them.

THE COURT: Yeah. And, Mr. Berg, I -- I see nothing unusual about the examiner's request. The examiner, other than his report, has no documents that aren't available from other parties and I agree that the examiner is not supposed to act as a free repository for discoverable evidence.

To the extent you --

MR. BERG: But the --

THE COURT: To the extent you're suggesting that

the -- you want the documents because you may want to instigate litigation against the examiner for misconduct, I'm not going to allow that. The examiner was appointed as an officer of the court to provide a report to the Court and the examiner did exactly what the Court asked the examiner to do. Whether you disagree with the conclusions of the report, I don't think that's relevant. I think the fact is the report was issued and that's exactly what the examiner was required to do. And the examiner is entitled to exculpation to the extent his activities were conducted in this case.

MR. BERG: Okay. Well, thank you, Your Honor, for considering my -- my attempt at least.

THE COURT: All right. I will enter the order. You've worked out the thirty-day --

MR. SEWELL: Yes, Your Honor. We'll submit that order under certification of counsel.

How does your -- does Your Honor want me to wait with respect to the final application for compensation so that's heard with the other ones or -- or should we submit an order on that as well?

THE COURT: I -- I don't think there's any reason to wait. Do any of the other administrative professional parties agree?

MR. ROSEN: We have no problem with it going

forward now, Your Honor.

THE COURT: All right.

MR. SEWELL: Okay.

THE COURT: I have no problem with the fee requested by the examiner. I will approve it --

MR. SEWELL: Okay.

THE COURT: -- on a final basis.

MR. SEWELL: Thank you, Your Honor. I appreciate that.

And with that, Your Honor, may I be excused?

THE COURT: You may.

MR. SEWELL: Thank you.

MR. ROSEN: Thanks.

THE COURT: And I thank the examiner for his work.

MR. SEWELL: Thank you.

MR. ROSEN: Thanks, Henry.

Your Honor, that takes us to Item Number 25, and it's reflected on here as being continued. I just want the Court to note that this was the motion of Greg Camas or Camas with respect to extending the time period to file a claim.

THE COURT: Okay.

MR. ROSEN: So we're going to push that to the end of May.

THE COURT: Okay.

MR. ROSEN: Your Honor, what I would like to do now is proceed to Item Number 28, which were all of those fee applications that we had attached there or the index as Exhibit H referenced. I know that speaking from -- I know that speaking from the perspective of Weil, Gotshal and Manges, we have had some discussions with the United States Trustee, Ms. Leamy, and as a result of that, Weil, Gotshal reduced its fee application by $50,245.78. This was a voluntary reduction, but it addressed some of the concerns that Ms. Leamy had.

I know that we have circulated to the parties a chart which sets forth what the numbers are after discussions with Ms. Leamy for the other professionals as well, and I believe that the United Sates Trustee has no objections to the entry of this form of order on an interim basis subject to the final fee hearing which is going to be heard, Your Honor, in the last week of July.

THE COURT: Is that correct, Ms. Leamy?

MS. LEAMY: Good morning, Your Honor. Jane Leamy for the United States Trustee.

Mr. Rosen's correct and I believe there is a summary chart that he will hand up that indicates some other reductions as well.

Thank you.

THE COURT: Okay.

MR. ROSEN: Your Honor, may I approach?

THE COURT: You may.

All right. Well, there were some objections, I think, to some of the interim fee requests.

MR. ROSEN: Yes, Your Honor. I don't know if Mr. Schukfed (ph) is on the phone. Mr. Schukfed files one to the Weil Gotshal and to the Alvarez and Marsal every month as well as I think he -- he may now lodge some to -- objections to a few others as well. And he has been doing this throughout the Chapter 11 case, Your Honor. We've never addressed them, Your Honor. We've always said we would carry it to the final. If the Court would like to address it now, obviously -- Mr. Schukfed may be on the phone. I don't know, though.

THE COURT: I thought I saw -- I guess he is not. I will deal with those at the -- at the final fee application. I had no other concerns and will approve the fees on an interim basis.

MR. ROSEN: Thank you very much, Your Honor.

Your Honor, I think we can get rid of one other status conference on a fairly expedited basis, and this would be Item Number 27 on the agenda. It is a status conference with respect to the adversary proceeding that was commenced, Washington Mutual, Inc. versus XL Specialty Insurance Company, et al.

(Pause)

MR. OLIVERE: Good morning, Your Honor. Mark Olivere, Cousins, Chipman and Brown, counsel to WMI liquidating trust with respect to adversary proceeding 12-50422 against XL Specialty Insurance Company and eleven other insurance carriers.

Your Honor, today was originally scheduled as a Rule 16(b) scheduling conference, but with the consent of chambers and the stipulation among the parties here, we have agreed to go forward today as just a status conference only.

Your Honor, in connection with that the parties filed a join status report last Friday. A copy should have been included in your binder. If you don't, I have another copy I can hand up.

THE COURT: I do have that.

MR. OLIVERE: Okay, Your Honor.

Well, Your Honor, joining me is my co-counsel, Matt Heyn from the law firm of Klee, Tuchin, Bogdanoff and Stern. Mr. Heyn has previously been admitted pro hac in these cases and with the Court's permission I'll just turn it over to Mr. Heyn to go over the status and answer any questions you have.

THE COURT: Thank you.

MR. HEYN: Good morning, Your Honor. As my colleague said, Matt Heyn, from Klee, Tuchin, Bogdanoff and

Stern.

Your Honor, this is a adversary proceeding against twelve insurance carriers seeking damages for breach of contract, damages for breach of the duty of good faith, and declaratory relief.

Pursuant to Your Honor's order, we've continued the response deadline to the complaint until today. At our Rule 26(f) conference with the insurance carriers they indicated that they would be filing a motion -- one or more motions to dismiss today, which we will answer in five weeks, and a reply will be coming shortly thereafter.

We would propose that the Rule 16 scheduling conference be continued until about one month after Your Honor decides these motions to dismiss. Although they might not have made it in the binder, there was filed a joint status report signed off by all parties to this adversary proceeding agreeing to this -- this course.

THE COURT: Yeah. I did see that and that is fine.

MR. HEYN: If Your Honor has any questions, I'm happy to address them now. I -- I don't want to unfairly prejudice the defendants who may not be here.

THE COURT: No. I have no questions.

MR. HEYN: Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. ROSEN: Your Honor, I believe that takes us now to Items 20 and --

THE COURT: 26.

MR. ROSEN: -- 26, that sounds about right, 26 and I will cede the podium to Mr. Etkin or Mr. Sherwood and Ms. Kaswan.

THE COURT: Thank you.

(Pause)

MR. SHERWOOD: Good morning, Your Honor.

THE COURT: Could -- could the operator mute the lines? We're getting some screeching. Thank you.

Go ahead.

MR. SHERWOOD: Your Honor, Jack Sherwood from Lowenstein Sandler. My partner, Mickey Etkin is here. Beth Kaswan, Chris Lometti and Craig Springer for the MBS plaintiffs.

This is our motion to allow the MBS claim as a Class 12 claim. This motion was initially filed before confirmation and was postponed until after confirmation by the Court and then adjourned a few times by the -- by the parties until today. Also, by stipulation with the debtors, we were allowed to file a reply by Friday at noon, which we filed.

THE COURT: I did get that.

MR. SHERWOOD: Your Honor, I think that reply and

our original papers pretty well lay out our position on this motion. But I would like to emphasize a few points.

First, Your Honor, when we talk about the stipulation of November 20th, 2010, which is a focal point of this motion, that stipulation permits the MBS plaintiffs to re-file their claims in the event there is a recovery for holders of allowed subordinated claims as that term is defined in the plan.

Importantly, Your Honor, that stipulation does not limit the form of the recovery under the plan and nowhere in that stipulation is there an agreement by the MBS plaintiffs with respect to classification of the claims once they are re-filed.

One of the interesting or important points is that the amended thirty-second objection to claims which gave rise to the stipulation didn't even raise the issue of subordination under Section 510(b), and neither did the seventh amended plan address subordination. So I think when you talk about the intent and the clear language of the stipulation, it's clear on its face and the Court should apply it as written.

The debtors argue that the term "recovery" has not kicked in yet. I'll call this the trigger argument.

THE COURT: Uh-huh.

MR. SHERWOOD: Has -- has the trigger occurred for

the filing of the proof of claim, and we think it's clear that it did. We cite to Black's Law Dictionary on recovery. It's a -- it's a pretty easy word to figure out. The trigger for re-filing the claim, Your Honor, was simply recovery, not a non-contingent recovery. There is no question, Your Honor, that there was a recovery to Class 18 under the seventh amended plan. We -- we make a number of arguments on that point in our papers, but I think there -- there are two very good ones that I would like to highlight.

The first is if you look at Section 1126(g) of the code, that provision provides that creditors who do not receive any property under the plan are deemed to reject the plan and they're not allowed to vote. Under the plan, the debtors here considered Class 18 to be an impaired and voting class, and if holders of Class 18 claims were not entitled to any recovery under the plan as the debtors now allege in the context of this motion, as a matter of law under Section 1126(g) they would have been deemed to reject the plan and not allowed to vote.

Now, consistent with that, Your Honor, the plan itself provides at Section 30.2 at Page 73, it describes impaired classes entitled to vote on the plan. And it says the claims and equity interests in classes -- and it rattles off a number of classes including Class 18 -- are impaired and are receiving distributions pursuant to the plan and

are, therefore, entitled to vote to accept or reject the plan.

Likewise, Your Honor, in this Court's solicitation order which was filed on January 13th, 2011, it says at Paragraph K on Page 4, that Class 18 is described as subordinated claims and it says "they are impaired and entitled to receive distributions under the plan."

So, Your Honor, the record is clear, by virtue of 1126, that the -- that Class 18 is receiving property under the plan, and by virtue of this language in the plan and the solicitation order that Class 18 is receiving a distribution under the plan. I think it's clear that that also means that they are getting a recovery under the plan and that triggered -- that the trigger has been triggered and the filing of the proof of claim was -- was warranted.

Next, Your Honor, let me turn quickly to the argument by the objectors that somehow, somewhere in a stipulation there is a presumed agreement to be in Class 18. And my first response to that, Your Honor, is that when you have a clear agreement you shouldn't presume anything. The parole evidence rule, the case law on contract interpretation makes it pretty clear that the Court should not read something into a contract that isn't there. And, here, there is nowhere in the stipulation where the MBS plaintiffs agree to Class 18 treatment.

Again, when you highlight, Your Honor, that the motion before the Court that gives right -- rise to the stipulation was a motion not -- that didn't deal with classification. It dealt with the merits of the claim. And what happened back in November of 2010 was that you had a situation where you had massive potential litigation to over claim that may or may not have been subordinated at the time, and simply the parties did what -- what parties do in cases like that is -- is the MBS plaintiffs chose to litigate that issue in the district court, fully reserving all rights here once the trigger occur -- occurred. But there was never ever an agreement to subordinate.

Your Honor, we -- we -- you know, we try to highlight that because this is a big case with a lot of things going on. And in this case the debtor sought and obtained agreements from various parties and we -- we referred to a couple of those agreements where subordination was sought and obtained by the debtors. So, certainly, if the debtors intent was to get us to subordinate back in November of 2010, they knew how to do that, but they didn't.

Your Honor, the -- we also -- we also cite the Court to the comments of debtors' counsel prior to confirmation in the context of the estimate -- the voting motion. We -- we cite to the quote where counsel says that all the debtor had dealt with up to that point in time was

whether the claim would ultimately be allowed or disallowed on the merits. And, Your Honor, I tried -- I've tried to make it clear every time I've gotten up here was that we never ever were seeking a full blown hearing on the merits of our claim, but we just wanted to know what class we were in before confirmation so that we could address that at confirmation.

But -- but what counsel said quite clearly was that the debtor never took the position at all as to whether they -- that's the MBS plaintiffs -- would be treated in Class 12 or Class 18. So when he stood here and said that prior to confirmation, he conceded that the debtors and the estate had not obtained a concession from us with regard to subordination.

Yet, in the context of this motion, Your Honor, the debtor suggests that they had obtained such a concession and that it was clear that those positions, frankly, are -- are very, very inconsistent. The debtor is also -- and the committee before the confirmation hearing suggested to this Court when we were trying to have the issue of the class of our claim heard and determined by the Court before confirmation, that the issue of whether we were in Class 18 or Class 12 was one that would require extensive litigation.

Again, Your Honor, that is a hundred-and-eighty degrees from the position that they now take that this

agreement in November of 2010 in the stipulation is somehow a clear indication that we agreed to be in Class 18.

If that was their position, Your Honor, I respectfully submit that they should have made that clear before confirmation. But for reasons that I think I've gone into before with Your Honor and -- in the papers, that's not something that they wanted to do. They deliberately took the position that we were in Class 12 for voting purposes so that they could turn around after confirmation, like they're -- exactly like they're doing now and -- flip-flop on the issue, which is interesting and creative, perhaps, but it's totally unfair and unjust to my clients.

Your Honor, just a couple more points on -- on -- you know, the fact that we didn't agree to be in Class 18.

First, the seventh amended plan requires entry of a final order determining that a claim is subordinated in accordance with the Bankruptcy Code and -- and that would be in plan Section 1.153, and no such final order was ever entered.

And then, finally, Your Honor, on that issue Paragraph 3 of the stipulation itself states that the parties reserve all rights in all other respects, other than those specifically addressed in the stipulation. The stipulation has a full integration clause, so, again, Your Honor, the stipulation should be read as its written and the

Court should not read anything into that concerning Class 18.

I -- at this point, Your Honor, I would like to turn to the Tranquility issue that -- that's addressed by the debtors' papers and -- and ours.

First of all, Your Honor, Rule 59(e) is -- is ignored largely by the debtors' papers. That is a high standard and it has to be something more than we forgot to argue it the first time. And the objection by the committee and the debtor or -- or the trust does not even try to -- try to address the Rule 59(e) standard. There was no newly discovered evidence. There was no newly discovered legal principle or intervening legal principle. It really is a case that the estate professionals basically said, wow. We should have -- we should have argued this SEC reg, but they didn't.

Now we -- we are -- we are raising the Rule 59(e) argument because we have it, but, frankly, Your Honor, we think Tranquility was right. And whether you did or didn't consider the SEC regulation, we think Your Honor would -- would decide the same way. And that is because the SEC regulation talk about who was a depositor and who was an issuer for SEC purposes. And, essentially, what that does is it sort of spreads liability beyond, you know, in this case the trust to other people who have the responsibility

for reporting and so forth.

But that's not why Your Honor -- Your Honor's decision in Tranquility and in Mobil Tool is based on the principle, which isn't changed in the least by the SEC reg, that here we had some -- some trusts that had pools of mortgages and the investors were not investing in a debtor or an affiliate of the debtor, which is what 510(b) says. They were -- they were investing in these pools of mortgages and they didn't enjoy the benefits of good performance by debtor or an affiliate or the -- or the risks of -- of bad performance by a debtor or affiliate.

There, the successor failure of their investment rose or fell based on the performance of the mortgages. And I think in the -- in the Tranquility opinion Your Honor gave the example of -- of a sale of Apple stock or a broker dealer selling dealer securities and suddenly bringing -- having that -- those types of situation bring 510 into play, and that certainly is not the intention of 510 and it shouldn't be applied, whether or not you consider that -- that SEC reg.

And, Your Honor, just to wrap that up, we also cited from, I think it's Judge Shannon in SemCrude where he made a -- a statement that is very applicable here, and that is that, you know, a word might have one meaning for SEC purposes where the SEC wants accountability and maybe to

spread responsibility for certain things, but another for 510 and -- and we think that Your Honor -- Your Honor's view of Tranquility and the purpose of 510 should continue to carry the day, if the Court has to get there because they haven't satisfied Rule 59(e).

Your Honor, let me just spend one -- one more brief period of time on -- on the reserve issue and the release. Of course, Your Honor, it's our view that that reserve needs to stay in place while we get to the bottom of this. The four-hundred-and-thirty-five-million-dollar reserve was put up by the debtor in a Class 12. It was their decision to do that, and that reserve must stand throughout the pendency of this litigation until it's litigated to a final order.

And I think if Your Honor reads the confirmation order together with the language of the plan, it is beyond dispute that unless and until this Court enters -- or this Court or some other Court enters a final order disposing of this claim, that escrow -- that -- that reserve needs to stay in place.

So, again, Your Honor, obviously we hope that doesn't become relevant for today's purposes, but if it does, we -- we think that the Court cannot order the release of the reserve because that would be a violation of the clear terms of the confirmation and the plan pursuant to

which the reserve was set up.

Your Honor, I -- if the Court has any questions, I -- I can answer otherwise I would maybe reserve some time on rebuttal.

THE COURT: You may.

MR. SHERWOOD: Okay. Thank you.

MR. STROCHAK: Good morning, Your Honor. Morning by just a few minutes till. Adam Strochak, Weil, Gotshal and Manges for the liquidating trust.

Let me start with a little background on our perspective on the stipulation issue and -- and the reasons why we agree to it in the first place and -- and why we think its intent is -- is quite clear from the language of the stipulation as well as the circumstances under which it was entered.

We knew fairly early on in this case that -- that timely distributions were going to be critical and that in order to achieve timely distributions, in order to -- in addition to getting past confirmation, which took longer than anyone hoped or anticipated, that we were going to need to make progress in the claims process because we -- we were fundamentally going to have a limited fund and there were going to have to be certain reserves and those reserves would -- would cause delays in distributions to -- to credit -- to holders of allowed claims.

So we needed a priority throughout the case to move as quickly as we could through the claims process and -- and, obviously, as Your Honor is aware, we -- this is not a case where we sat back and waited until the plan got confirmed to -- to really make significant progress in objecting to -- to claims and -- and moving through the claims resolution process. So -- so that was really a quite critical issue early on.

When we filed the initial objection and then resolved the initial objection to the MBS plaintiffs' claims, we had a plan out there that provided for a contingent distribution to subordinated creditors with a very wide range on it of somewhere between zero and a hundred percent recovery.

So what we agreed to with them was a stipulation that provided for the withdrawal of their claim. We didn't simply stay the claims litigation process. We didn't just agree to a standstill. We -- we worked out a stipulation that provided for the complete withdrawal of their claims with a right to re-file in the event there was a recovery for -- for subordinated claims.

And we think it's quite clear when you look at the stipulation as a whole and when you look at all the circumstances under which it was entered, that implicit in that and that the only reasonable way to interpret the right

to re-file language is that the right to re-file would -- would only apply to a subordinated claim. Otherwise, the language regarding the timing of re-filing; that is, if there is a recovery for subordinated claims, really makes no sense at all.

If the -- if the plaintiffs were taking the position that -- that -- that they were entitled to a general unsecured claim, then it would have made sense to proceed with that litigation and get to the point where there was a judgment resolving their claim one way or the other rather than deferring it until it became clearer what the ultimate recovery for -- for subordinated creditors would be.

The withdrawal has -- has meaning and -- and to interpret the stipulation the way the plaintiffs are suggesting now really -- really guts the meaning of the stipulation from our perspective and what it achieved from our perspective.

So fast-forward to -- to the current -- the plan that was actually confirmed and we have a plan that -- that provides for subordinated creditors much the same way as the plan that was on file at the time of the stipulation. The plan confirmed by the Court provides for a distribution of -- of liquidating trust interests to subordinated creditors if -- it's a contingent distribution -- if we ever get to

the point where there's sufficient value to clear what's ahead of them in the waterfall. So it's a wholly contingent right to receive liquidation trust interest at a time in the future in the event that the waterfall satisfies all -- all claims ahead of them.

So -- so when you compare what was on file at the time of the stipulation and -- and what we actually ended up with in a confirmed plan, there really is no difference from -- from the perspective of the stipulation and what the stipulation achieved for the debtors.

So the interpretation that the -- that the plaintiffs are now offering is one that basically says, well, there really was no bargain for -- for the -- for the debtors; that is, we -- we had the right to re-file at any time.

So while the debtors gave up their right and the creditors' committee and every other party interest -- party in interest in the case, while they -- they gave up their right to proceed in a timely fashion with adjudication of this claim so that it could be resolved and not present any -- any difficulties for distributions to creditors on account of any reserve or -- or any other issue -- that's what the debtors got -- that the -- that the plaintiffs, essentially, had the right to vitiate that bargain at any time. They could come in at any time and say, well, you

know, the plan provides for a contingent right of distribution to subordinated creditors. Therefore, there's been a recovery and we can go ahead and -- and move forward with -- with assertion of our claim.

And --

THE COURT: Mr. Strochak --

MR. STROCHAK: Uh-huh.

THE COURT: -- does the plan provide that liquidating trust certificates are not distributed now, but only after the waterfall is satisfied?

MR. STROCHAK: That's my understanding, Your Honor. Yeah. I'm getting a lot of head nods that I got that one correct.

THE COURT: Yeah.

MR. STROCHAK: So there's no actual distribution of certificates at this time and while the liquidating trustee, the trust advisory board, and -- and everyone else who is involved in the process is obviously working as hard as they can to get distributions as far down the waterfall as -- as is possible, at this point we don't know whether there ultimately will be any trust certificates distributed.

So we -- we made this point in our papers, Your Honor, on the -- on the definition of recovery and in the stipulation, of course. As interpreting that stipulation one question for the Court is, well, what does it mean for

there to be a recovery, and I think, you know, Your Honor's question suggests exactly where -- where we think it is, is that nothing has been distributed at this point in time, so, therefore, there's no recovery.

The plaintiffs' have cited Black's Law Dictionary and they actually cite the second definition in Black's. The first definition that Black's offers for recovery is -- is regaining or restoring something taken away. Well, under our plan and -- and, you know, obviously, everybody wishes it could have been better. But -- but nothing has been regained or restored at this point. The subordinated creditors, to the extent they had claims, be they disputed or -- or fixed, to the extent that they had claims, they have received nothing on those claims until some as yet undefined point in the future hopefully; a bit of a hope certificate on -- on those.

And they cited the Enron decision, which while not directly on point and I don't suggest that it was directly on point, provides a useful analogy. In Enron there was an objection to -- to distributions -- excuse me. There was an objection to the plan on the grounds that it was providing property to -- to a subordinated class or to a shareholder class, when what the plan said was that it would be a contingent right of distribution should -- should distributions clear the rest of the waterfall.

And -- and Judge Gonzalez, I believe, overruled that objection and said, no. This doesn't violate the absolute priority rule. There's no distribution being made. It's simply a contingent right to get something in the future should -- should the waterfall fill the rest of the -- of the recoveries. And it's an analogous situation here.

So you may be asking, Your Honor, what -- what's the harm in being early. We often complain that people are late and the Bankruptcy Code has a -- Bankruptcy Code and the case law, of course, has well defined standards for under what circumstances we'll allow somebody to assert a right if they -- if they're late. But what's the harm in being early?

Well, here the harm is that it would vitiate the bargain that we struck on -- on the stipulation; that we bargained for the withdrawal of that claim so that we would not have to deal with reserves, that we would not have to deal with litigation of these issues unless and until there was actually recovery for subordinated creditors. And it has a very real effect on the other creditors of the estate, on senior creditors of the estate.

There was -- I think -- I think Mr. Sherwood may have misspoken unintentionally. The reserve is not $435 million, you know, cash set aside. That's not the way the reserve works under our plan. The way the reserve works is

-- is that we have to reserve for the claim as if it were an allowed claim in the amount of 435. So all -- all claims, all disputed claims are reserved for as if they were allowed in that amount and then that is calculated in accordance with the holdbacks and everything else.

The effect of reserving as if they are an allowed claim is -- is quite significant due to the accruance -- the accruing of post-petition interest, continuing accrual of post-petition interest on claims -- on allowed claims that have not received their distribution, and has a particularly dramatic effect due to the Court's rulings with respect to the pay-over requirements of the contractually subordinated creditors, in particular the peers.

So we have those in our papers and -- and, you know, the rough calculation is that -- that continuing to reserve for the MBS plaintiffs' claim as if it were an allowed claim of 435 million essentially incurs $700,000 per month in additional post-petition interest expense because -- because that money, what's held back, can't be distributed to holders of allowed claims and the interest continues to accrue on what has not been distributed on their claims.

The effect is much more significant on the peers due to the contractual pay-over requirement. The peers, while they accrue interest at the federal judgment rate in

accordance with the Court's order, they pay-over interest to senior creditors at the contractual rate. So the effect on the peers is to reduce their recovery by -- by about $2 million a month. So it's a quite significant effect on -- on all creditors of the estate and a very dramatic effect on the peers to continue to have to hold the reserve for -- for the MBS claim.

Let me comment briefly on the assertion that we somehow, I guess, sandbagged them and -- and that the comments made in connection with the temporary allowance motion at the time of confirmation are some type of admission that -- that we never expected that -- that the stipulation would limit them only to a subordinated claim.

It's always been our position that the -- that the stipulation limited them to a subordinated claim. We just didn't expect them to agree with it, and, obviously, they haven't. The temporary allowance motion, Your Honor remembers, was -- came before the Court on the MBS plaintiffs' application to -- to temporarily allow their claim into a Class 12 for voting purposes. They asked for it in Class 12 and we looked at the circumstances and said, okay. We can agree to that.

And -- and then they took a step back and said, well, we're not sure we really want what we asked for. We're afraid that you might ultimately try and subordinate

us, so what we really want is by -- by giving us temporary allowance in Class 12, there ought to be a final determination that -- that for distribution purposes we're in Class 12. And we stood up and said, no. That's not what temporary allowance is about.

And Your Honor ultimately agreed with us that -- that there was not going to be a determination of -- of the classification for distribution purposes at the time of confirmation; that that was an issue for later, and that because the plaintiffs had asked for temporary allowance in Class 12, it was appropriate to give them temporary allowance for voting purposes in Class 12, notwithstanding the fact that down the road there was going to be a dispute over whether it was a general unsecured claim or a subordinated claim, both under the stipulation and should we clear the stipulation under -- under 510(b) which would -- which would need to be adjudicated.

And while the MBS plaintiffs contend -- contended that that was unfair, Your Honor ultimately ruled that it was not unfair; that creditors all the time bear the risk that they might later be subordinated due to -- due to the application of 510(b) or other principles of subordination. So that's where we were on that.

Let me pause on the 1126 argument that -- that Mr. Sherwood made in his remarks. He is suggesting that -- that

under 1126 creditors who didn't get property would be deemed to reject and, therefore, if we go back to the question of recovery, has there been any recovery at this point for subordinated creditors that would allow reassertion of the claim, that we should look to 1126(g) for guidance.

We certainly could have, under 1126(g) said that there's no distribution to subordinated creditors. It's only a contingent right in the event we clear the waterfall later. So we'll just deem them to reject the plan and -- and effectively cram down over them. But that wouldn't work under our plan, Your Honor.

Your Honor, we worked for -- for three years to try and get a recovery to -- to shareholders. We had enormous litigation over that and we ended up with a -- with a plan that was the product of really an extraordinarily -- extraordinary compromise and we wanted anyone senior to shareholders to vote in order to -- to confirm that plan without having to deal with Armstrong issues or absolute priority issues or anything else.

And, ultimately, we did get to vote. The plan was confirmed in history. That's obviously very familiar to the Court. So that's the reason why we proceeded that way. I think we probably could have gone either way under 1126 and that's why we opted to go the way we did.

Let -- let me turn if I could to merits of the

subordination argument and -- and start with the reconsideration aspects. We're here on a different claim now, Your Honor.

Tranquility had not filed a lawsuit before asserting its proof of claim. The plaintiffs here obviously had. There certainly are similarities in the claims. There are common issues. There are also very different issues. The bulk of Tranquility's claim was asserted under California State Securities law. They only had a handful of -- of tranches subject to federal law, and as Your Honor is familiar from the opinions and the history of that matter.

Even if we were to look at this through the lens of reconsideration, what the plaintiffs are trying to do here is to -- is to say that the Court's ruling on the Tranquility matter is absolute, final law of the case, never get to look at it again. But that's not what the law of the case doctrine is about, Your Honor.

The law of the case doctrine is about when a matter is -- is kind of firmly settled, that it's going to govern for the rest of the case. There is no conceivable way that the Tranquility matter could be considered resolved or settled as a matter of law. We had a timely motion for reconsideration of the Court's decision pending, which the creditors' committee had filed and which the debtors had joined. That matter was pending when we reached a

compromise to resolve the Tranquility claim.

But the issues that were raised in the reconsideration motion had not been adjudicated. That motion was still pending. The MBS plaintiffs intervened in that motion so that they could be heard on it, on the merits presumably because if all they were going to do is step up and say, too little, too late, Your Honor, that's certainly an argument that Tranquility could have and -- and I'm sure would have made had we -- had we litigated that motion before -- before settling the claim.

So the matter is not settled. The motion for reconsideration remains pending and there is absolutely no reason that the Court should not address that -- that is, should it reach the subordination issues, there is no reason that the Court should not address it in full and address all the substantive issues that -- that are before the Court.

Even if the Court were to look at it through the lens of reconsideration, our argument, Your Honor, is that the Court's decision on -- on subordination is -- falls into the category of a clear error of law that ought to be corrected, and it's obviously with -- with all due respect to the Court that -- that we suggest that.

You know, having read the opinion when it came down and the Court's reasoning, it became apparent to the creditors' committee and to the debtors that -- that

Tranquility had led the Court to an incorrect decision as a matter of law and that it was really incumbent on us, on behalf of the estate, to raise that and -- and make sure that we put before the Court all the information necessary so that -- so that -- in our view it was an error and if the Court concluded it was an error, it would have the benefit of all -- all the reasoning and rationale before it before that decision became final.

The fundamental left turn that we think Tranquility made in its analysis and -- and ended up in the Court's opinion was the distinction between issuer and issuing entity. And this becomes clear in looking at the MBS plaintiffs' amended complaint in the -- in the Western District of Washington action as well as their amended proof of claim asserted here.

In the very beginning of the amended complaint, the plaintiffs talk about their action on -- on securities issued and served by -- by WaMu Capital, the underwriter, in conjunction with the depositors of the -- of the mortgage assets into the trusts: The Washington Mutual -- excuse me -- WaMu Asset Acceptance Corporation and Washington Mutual Mortgage Securities Corporation.

That filters through into the amended proof of claim that they've asserted here where it alleges quite clearly in Paragraph 134 -- it takes a while to get to it.

But in 134 they make it, you know, quite clear the allegation that -- that WaMu Asset Acceptance Corporation served as the issuer of the mortgage-backed securities that -- that the plaintiffs purchased.

It becomes even clearer in looking at the -- at the complaint as a whole; that is, in the Western District of Washington the plaintiffs didn't sue the trusts. They didn't sue the trusts at all. They sued Washington Mutual Asset Acceptance, Washington Mutual Capital Corporation. Their claim; that is, their fundamental allegation that there has been illegality in the issuance of the securities that they purchased, that claim is one that is asserted against, among other entities, the depositor, not the trust.

And the reason for that is -- is because of -- of the principles under the securities law that we have -- that we have laid out -- the creditors' committee laid out in its motion to amend and we have incorporated into our response to the -- to the pending motion for a determination that -- that plaintiffs have filed for a determination that this claim is essentially not subject to subordination. What they're really seeking now in the pending motion is a declaration that -- that their claim is not subject to subordination as a matter of law.

And, you know, we've looked at that and concluded, much for the same reason that we did in -- in conjunction

with Tranquility where we went ahead and Tranquility had objected and -- and said that, no, you shouldn't deal with subordination now, Your Honor. We asked the Court to address subordination and for the same reason that we did in conjunction with Tranquility, we think it's appropriate for the Court to -- to address it here and now should it -- should it reach the issue and not resolve it based on the -- on the stipulation.

So -- so what's the error in the Tranquility analysis and why should -- should the result that the Court reached in the Tranquility opinion not pertain here?

The real issue, obviously, goes back to 510(b) as it must. What we're -- what we're talking about is fundamentally a question of statutory interpretation and Section 510(b) says that -- that we subordinate a claim that arises from the purchase or sale of a security of the debtor or an affiliate of the debtor. It doesn't say a security for which the debtor or the affiliate is the issuing entity. It says, a security of the debtor or an affiliate of the debtor.

And the problem is this distinction, this artificial distinction that says, well, if it's a security for which the affiliate is the issuing entity, then -- then no subordination. If it's a security for -- if it's a security of an entity that's the issuer, then -- then, yes,

subordination. And it's that distinction, that fundamental distinction that we think is the -- is the error.

We have a situation here where the securities laws provide quite unambiguously that -- that the issuer of mortgage-backed securities is the depositor that deposits the mortgages into the trust. The trust is merely a conduit. The trust holds the mortgages, distributes the principal and interest payments, works with the servicer to make sure the mortgages get serviced. But it's really a conduit entity, and it's the -- it's the depositor, for securities law purposes, that's the issuer. It's the depositor who is involved in the issuance of the security and it's the depositor who the plaintiffs have asserted is responsible for illegality in the issuance of the -- of the securities.

Your Honor's opinion discussed the circumstances of, well, let's think of the debtor or the affiliate was just an underwriter or a broker and all it did was sell stock of some third party company. I think Your Honor used Apple --

THE COURT: Uh-huh.

MR. STROCHAK: -- in the decision. So -- so why should this be any different. And the reason why it's different, Your Honor, is because of the securities laws and because we're dealing with mortgage-backed securities here.

This is not a situation where -- where we have truly a -- a completely third party security that has nothing to do with -- with either the debtor or the affiliate. This is -- this is mortgage-backed securities. We live under a different regulatory regime that -- that concludes that it is the depositor that is the issuer of the security.

So while it's undisputed that Apple would be completely unrelated to this estate in the hypothetical, the same conclusion cannot be reached as to -- as to the issuer of the securities for securities laws purposes. And the issuer -- excuse me -- the issuer under securities laws, the depositor, Washington Mutual, WaMu Asset Acceptance Corporation is undisputedly an affiliate of the debtor in this case. I don't think the plaintiffs have disputed that and I think it's -- it's quite clear from the record that -- that that's the case.

So we have a situation where under the securities laws WaMu Asset Acceptance is the issuer. It is the one charged with responsibility for ensuring that the issuance of the securities is legal. The plaintiffs are asserting claims in -- in the Western District of Washington against WaMu Asset Acceptance, and WaMu Asset Acceptance is indisputably an affiliate of the debtor at the time of the issuance of the securities.

So when you add all that up, we end up with a situation that quite clearly demonstrates that the Court's conclusion that -- that neither the debtors nor their affiliates are issuers in -- in reaching its decision on subordination, and that's a quote from Page 20 of the Court's -- of the Court's opinion. But that seems to us to be quite contrary to what the securities laws provide and -- and we think leads inevitably to the result that these claims, the MBS amended claim, must be subject to subordination under Section 510(b) should we -- should we get to the subordination issue on the -- on the merits.

I've struggled, Your Honor, and I can't find any principal basis to come to the conclusion that the purposes of Section 510(b) would be served any differently or there should be any distinction between whether a claim is asserted against an issuing entity or an issuer. I don't see any principal basis to make a distinction why the policies of Section 510(b) would be applied any differently to -- to a claim whether it's -- whether it's against the issuer or whether it's against the issuing entity of the securities. It just doesn't make any sense to me under 510(b), and I've searched and scoured the case law and the commentary for a rationale why they would be treated any different and I -- and I simply can't -- I can't find any, nor have the plaintiffs articulated any.

The real issue is -- is as Slane and Kripke (ph) made clear and all the rest of the commentary and much of the case law makes clear is, you know, are we in a situation where the risk of illegality in the issuance of the security should be shifted in some way. And it -- it seems, you know, patently clear here that -- that where the code very specifically provides that -- that we subordinate not just claims associated with the purchase or sale of equity securities, but also debt securities. That's perfectly clear from the statute. Your Honor has already ruled that way in connection with the WMB bondholders' disputes.

Where the statute makes the distinction between equity securities and debt securities and where the statute clearly provides that subordination is applicable to securities of affiliates as well as securities of the debtor. We are not in a world where we are talking about who bears the risk of illegality of issuance as between -- as between the purchasers of the securities and equity holders of -- of the company as you would be in a traditional, you know, stock subordination argument.

This is not that circumstance. This is the circumstance where we're talking about the risk of illegality in issuance and whether a claim should be treated pari passu with general creditors of the estate or whether it should fall below general creditors of the estate.

And for all the same reasons that -- that subordination is there, we have a situation here where the plaintiffs have a separate set of assets. Their rights are the mortgage-backed securities and the mortgages that provide principal and interest payments for those securities where those assets are separate, where -- where there is no assertion whatsoever that those assets would be available for distribution to general creditors of the -- of the holding company estate. Those assets are gone from the system so to speak. They're in the trust and the general creditors of the estate have no access to those, nor do they have any right of upside in the value that the -- that the plaintiffs acquired when they bought their securities.

If the mortgage-backed securities that they acquired did really well, if they had been underpriced in the market, if they had been purchased for 100 cents on the dollar and the market value increased to 105 cents -- I'm just -- I'm just pulling a hypothetical here -- that increase in value would have been solely for the plaintiffs to -- to enjoy. It would not have gone back to creditors of the estate in any way, shape, or form.

So for all the same reasons that you would subordinate claims relating to the purchase or sale of equity securities, it's equally applicable here because they enjoyed -- the plaintiffs enjoyed all of the upside here.

Just like the acquirer of stock would enjoy all the upside in the value of the company, the acquirer of these securities enjoyed all the upside in the value of the mortgage-backed securities.

And for those reasons there -- there simply is no policy basis to distinguish here between a security of an issuer, which is -- which is what we have here, or a security of an issuing entity. We just don't see the basis. And because -- because we do have securities of an issuer, WaMu Asset Acceptance, and because that issuer for securities law purposes is an affiliate of the debtors, the plain language of 510(b) requires -- requires subordination in this case.

Let me turn to the reserve just briefly, Your Honor. The plaintiffs are kind of standing general appellate principles on their head with respect to the reserve. The -- there was no assertion or no suggestion and no contemplation in the plan that should the Court conclude that a claim is not in a particular class, that we would have to continue to reserve in that class for the claim.

The Court has ample authority to order release of the reserve under the -- under the confirmation order. We have -- we specifically set up the reserve process in a way that we could come back and estimate claims, if we needed to. If we had a claim that was -- that was resulting in

prejudice to the parties on account of the reserve, that we could always come back and estimate the claim in order to -- in order to address that issue.

And the suggestion that we would have to keep the reserve in the wrong class, should the Court rule that the claim is subordinated, until the end of the appeal process, essentially, gives the plaintiffs the right to go off, file appeals. We could go all the way to the Supreme Court and it could take years to get that reserve released. To suggest that the Court is without authority to order the release of the reserve is -- is not consistent with -- with a prompt resolution of the estate or anything else in the plan or the confirmation order.

Now, certainly, if -- if the Court decides to release the reserve, the plaintiffs have the right to come back and say, we're going to appeal, Your Honor, and we would like a stay. We would like to maintain the status quo pending appeal. The rules provide an adequate mechanism for that and there's no reason that they should not be required to bond the costs to the estate of maintaining the reserve. And as I've articulated, it cost $2 million a month to the peers' recovery, $700,000 overall in increased interest payments by the -- by the estate.

And if we get to the point where the reserve is released and the plaintiffs appeal, then this issue can be

adequately dealt with in the context of an application for a stay pending appeal, and the Court's determination of what would be an appropriate bond on that -- on that appeal, given the detriment to the estate and other creditors of continuing to hold the reserve.

I'll stop there, Your Honor. I know Mr. Johnson probably wants to say a few words on behalf of the creditors' committee, unless you have any questions?

THE COURT: No. Thank you.

MR. STROCHAK: Thank you.

MR. JOHNSON: Good afternoon, Your Honor. Robert Johnson from Akin Gump on behalf of the official committee of unsecured creditors.

And before I begin, I would like to disclose that the liquidating trust has engaged Akin Gump for certain limited purposes, including advising the trust advisory board. But I'm here today on behalf of the creditors' committee, the creditors' committee which made the motion to alter, amend the Tranquility decision. We will be filing an amended 2014 statement shortly regarding that other engagement.

Also, before I begin, I'm going to make reference to a diagram which comes from the MBS plaintiffs' proof of claim. It's Page 59, Claim 4069. May I approach and hand up a copy?

THE COURT: You may.

Thank you.

MR. JOHNSON: Your Honor, I'll begin with the stipulation and order point. Much has been said on that already, but I just want to highlight a few points.

As -- as the liquidating trust has argued, there was no recovery of actual property to Class 18 at the time of the sixth amended plan nor now with the seventh amended plan. And so that's why we see that the stipulation and order that was entered into in November 2010 made sense; that if you were to interpret that stipulation and order as saying that there was already at that time a recovery to allowed subordinated claim, the MBS plaintiffs could have immediately re-filed their claim.

It only makes sense in the context of the mandatory subordination of mortgage-backed securities to other bonds that would place them in Class 18 that would then make sense to put off the litigation of the merits of the MBS plaintiffs' claim at that time in November 2010.

So we contend that -- that there was -- because there was no recovery at that time, and there has not yet been a recovery to Class 18 at this time, that it's inappropriate for the claim to be filed at this time.

The plaintiffs have accused us of playing fast and loose with them with regard to the debating, but it simply

isn't so. As the MBS plaintiffs have -- have alleged, as they have argued under Section 1126(g), if they were going to get no recovery, they would have been deemed to reject. They wouldn't have had to vote. They could have stayed in and -- and agreed to be in Class 18, as certain other securities fraud plaintiffs did, and they they could have voted in Class 18. But they choose not to do that.

Then when they came back in after the Tranquility decision and they filed their claim, they then, in my opinion, overreached by saying they wanted to be adjudicated to the Class 12 for all purposes, not merely for voting, but for all purposes. And we said at that time, if you want to vote in 12, we're happy to let you vote in 12, but you can't be adjudicated with a -- a shortcut approach. You have to be in Class 12 for all purposes. And on top of that it's quite clear from the stipulation and order that there had been no recovery to Class 18, still there's no recovery to Class 18, and that they belong in Class 18.

We also very clearly articulated that we, the creditors' committee, disagreed with the Tranquility decision. We had made the motion to alter or amend on January 3rd and we felt that when the time was appropriate, we would be able to make the arguments to Your Honor to explain why we believed that that Tranquility decision did contain an error of law and fact, and that it would cause a

manifest injustice to the creditors who were in Classes 2 through 16.

As to the issue of whether the claim was to be filed as a Class 12 or as a Class 18, there's just no such thing on a proof of claim. A proof of claim form has a box that you can check if you have a secured claim and it's got a box that you can check if you have a priority claim. But there's no place to put on a proof of claim form that this is only going to be filed a subordinated claim. So there's -- that argument is just a red herring, Your Honor.

I would like to move onto the subordination point and to -- to the Tranquility decision.

First, the plaintiffs have argued that we don't have an appropriate basis under Rule 59(e) for the motion to alter or amend. And I would like to highlight, Your Honor, this is not a new argument. The creditors' committee has consistently argued that the mortgage-backed securities at issue were the securities of WaMu Asset Acceptance Corp.

What happened, however, was during the argument, nobody made reference to Section 2(a)(4) of the Securities Act or Section 3(a)(8) of the Exchange Act. But this is a securities fraud case. The plaintiffs are making a claim under Section 15 of the Securities Act and you have to look at the statute under which a cause of action arises to look at the definitions.

And the definitions that are in the Securities Act provide very clearly in Section 204 and in Section 3(a)(8) that the depositor is the issuer. So for purposes of securities fraud, it's the depositor here, WaMu Asset Acceptance Corp., which is the issuer of those certificates, which we then served through the underwriter, WaMu Capital Corp, done through the investors.

And you'll see on the bag, ma'am, that the trust is below. The mortgage lines are transferred into that trust and then the certificates transfer up to the depositor. The depositor then transfers those to the underwriter and the underwriter sells them to the investors. So you can see from this arrangement that here -- and this is in the plaintiffs' own proof of claim -- it's the depositor here that's at issue.

Your Honor, the Max's Seafood case is a case that we put in our pleading to call to the Court's attention that the Third Circuit has said that if an argument -- that the Court must consider, on a motion to alter or amend, an argument, even if the argument had not previously been made. We had argued that the depositor was the issuer. It's just that those citations hadn't been provided at that time.

And I regret that those citations had not been provided to the Court at that time. It certainly would have made things a lot clearer if we had provided citations to

2(a)(4), 3(a)(8), Securities Rule 191, Rule 3(b)(19) and Regulation AB. Believe me, Your Honor, I did a lot of homework between December 20th of 2011 and January 3rd when we filed our motion to alter or amend.

But, unfortunately, Your Honor, in -- in the Court's decision with the sentence that says, "neither the debtors nor their affiliates are the issuers of the certificates," and that is the error that we wanted to call to the Court's attention because under the securities laws, which is at issue for a securities fraud case, it's the depositor that is the issuer, and that is WaMu Asset Acceptance Corp.

Now this is also what distinguishes this case from SemCrude that Judge Shannon decided. In SemCrude what Judge Shannon had before him was a limited partnership and he looked correctly at the Bankruptcy Code and said that the definition of affiliate did not include a limited partnership.

But here, the definition of an affiliate under the Bankruptcy Code clearly does include a corporation that is owned by WaMu Bank and that, in turn, is owned by WaMu, Inc. So here we do fall within the definition of an affiliate and that is what distinguishes us from the SemCrude decision.

It also distinguishes us from the analogy of Apple stock because what we have here in this diagram shows that

what -- what we have are mortgages that were originated by WaMu Bank, transferred down to this depositor, and then there was the securitization process to the investors. That's a far cry from a situation in which WaMu Capital Corp might be buying the stock of a completely unrelated entity. These are related entities as shown in the diagram that the MBS plaintiffs provided. And that shows why it's so different from Apple stock.

I would also like to point to the issue of the equity risk and the policy arguments that were made by the parties and by the Court with respect to 510(b). And what's important here is that it's not a question of acquiring an interest in the affiliate of the debtor when you're talking about a bond as opposed to a stock.

So just as those people who purchased the bonds of WaMu Bank did not acquire an equity interest in WaMu Bank, and yet their bonds were subordinated. The Court properly found that bonds that were issued by this entity, WaMu Bank, which is an affiliate of WaMu, Inc, those are subordinated with respect to WaMu, Inc's creditors. They are subordinated to the creditors of WaMu, Inc. So it's not a question of the equity interest in that entity. It's a question of the bond being subordinated to other bonds.

I would like to speak about the harm to the estate and to the creditors. As the liquidating trust has pointed

out, the clip of 435 million in reserve at the federal judgment rate gets to $700,000 a month, and so that's a true out-of-pocket expense to the liquidating trust. Of course, the peers suffer even more because due to their contractual pay-over requirements, they have to pay up to the more senior creditors, and so with respect to them, the cost is 2 million a month.

Your Honor, there may have been a mistake with respect to the citation or the lack of citation of the particular elements of the law and the prior arguments that were made, but there's no reason why that mistake now should inure to the detriment of these creditors.

I would also like to address the issue of the reserve. It simply makes no sense to require a reserve of cash if the Court determines -- which we respectfully submit the Court will after considering our arguments and our provision of the authority regarding the Securities Act and the regulations. It simply would make no sense to reserve cash for a claim that, as a matter of law, must be a subordinated claim.

We think that what would make sense would be that when we got to the point that liquidating trust interests were being distributed to other allowed subordinated claims, if at that time the MBS plaintiffs' claim is still contingent, if it's still undetermined, if it's still

unliquidated, then there could be a reserve of liquidating trusts' interests in the tranche that corresponds to Class 18 at that time. But there's no reason to hold up $435 million in cash which should be distributed to holders of claims in Classes 2 through 16 if there's no possibility that the MBS plaintiffs will end up with a claim that's in Class 12.

And so, finally, just to sum up, Your Honor, with respect to law of the case, law of the case, of course, is a discretionary doctrine and, Your Honor, we have made it quite clear from as soon as we -- we received the Tranquility decision through our motion to alter or amend that we disagreed with that. We take the position that the Tranquility decision was not a final decision because we had made the motion to alter or amend and it had not been decided.

We also believe that Your Honor should exercise her discretion not to apply law of the case with respect to Tranquility, but to find the law of the case that should be applied here is the law of the case with respect to the bank bondholders. It's that the bonds of an affiliate of the debtor must be subordinated to the other bonds.

Thank you, Your Honor.

THE COURT: Thank you.

Reply.

MR. SHERWOOD: I'll try to keep my remarks limited to reply.

First, Your Honor, let me just reemphasize that the extrinsic facts and circumstances and -- and so forth at the time of entering into the stipulation are irrelevant when the terms of the stipulation are clear; and clearly here they don't address classification; and clearly here they use the word "recovery" as opposed to actual recovery; and clearly here you have the debtor acknowledging that there was a distribution to Class 18 and that Class 18 received property.

But, Your Honor, if you're going to --

THE COURT: Well, I -- I think they said they did not. There was no issuance of litigating trust certificates to Class 18.

MR. SHERWOOD: They said that, but as a matter of law Your Honor can and should find that Class 18 received property under the plan because that's what would have to happen in order for Class 18 to vote and not be deemed to reject under Section 1126.

And, furthermore, Your Honor, it's really in black and white in the debtors' plan. The debtors' plan says that Class 18 is impaired and receiving distributions pursuant to the plan. That's a recovery. A distribution is a recovery and property is a recovery. And for them to start splitting

hairs now on what the meaning of a recovery is in order to keep us from filing our proof of claim --

THE COURT: Well, I'm -- I'm not sure anybody in Class 18 would say that they've gotten a distribution or any recovery as of today.

MR. SHERWOOD: Okay. Your Honor, that raises another good point.

First of all, at the time of the stipulation, the plan that was on file at that point in time was not confirmed. And more importantly, Your Honor, at that time the plan that was on file, and I think the second -- which was not confirmed, and I think the second plan that was not confirmed did not provide for the substantial return to equity that the seventh amended plan provides.

So that is an additional fact and circumstance that the Court should consider. If you think about it, if you want to go back and try to figure out what the facts and circumstances were back in November of 2010, there was no -- there -- there's 100 million-plus of return to equity under the seventh amended plan.

THE COURT: Why is that relevant?

MR. SHERWOOD: Because from the perspective of Class 18, a return to equity is very relevant. A 100 million -- if I'm sitting in Class 18, Your Honor --

THE COURT: Okay.

MR. SHERWOOD: -- and I see no -- a contingent recovery to my -- my constituency, my claim.

THE COURT: Yeah.

MR. SHERWOOD: Yet, I see below me a 100 million-plus recovery to equity, that's -- that's very important from the perspective of a Class 18 holder.

THE COURT: And they voted.

MR. SHERWOOD: Who voted?

THE COURT: Class 18.

MR. SHERWOOD: Class 18 voted and I think, Your Honor, if you look at Class 18, each and every member of Class 18 who voted got some other type of plan consideration under this plan. They got -- you take Tranquility, okay. Tranquility got like a nine-million-dollar Class 18 claim, but they also got a nine-million-dollar Class 12 claim provided they vote in favor of the -- of the plan.

You look at it -- there was another group. They got their counsel fees paid provide -- and, again, provided they vote in favor of the plan. And then there was Mr. Stark's clients who was -- was thrown a Class 18 claim along with substantial other consideration provided they vote in favor of the plan.

So, yeah, they voted and we didn't vote in Class 18 because -- because Your Honor had decided Tranquility. They had indicated that --

THE COURT: Well, you indicated you wanted to vote in Class 12.

MR. SHERWOOD: Correct. But at the same time, Your Honor, we indicated that if we were not going to be in Class 12, it would be nice for us to learn that that was the case before we voted. And, Your Honor, we -- we pressed that issue. We pressed that issue on multiple occasions and -- for the -- for the exact reason that we didn't want to be standing here today saying, Judge, we voted Class 12 and they're trying to put us in Class 18 under this stipulation, and because they want to overrule Tranquility --

THE COURT: But I overruled you on that. I did not decide the classification or amount of your claim for anything other than purposes of voting. And all parties rights were reserved to argue that.

MR. SHERWOOD: That's right. I'm not -- that happened and -- and it happened over my -- over my objection.

But it -- but I think it's something that I would -- would hope that the Court would consider at this point in time because I don't -- I don't think I would have done it any other way, even looking back. Your Honor had decided Tranquility. If -- I mean, what gets me about it, Your Honor, the change of position is what they're saying here is that this -- that this trigger has not occurred, and they

could have said that before confirmation. They could have asked Your Honor --

THE COURT: I think they did say.

MR. SHERWOOD: They could have asked Your Honor to reconsider and rule whether you're going to reconsider Tranquility before confirmation.

THE COURT: but -- but they didn't. They had a lot of other things going on and the whole purpose really of the stipulation was to not decide those issues. Wasn't that the purpose of the stipulation?

MR. SHERWOOD: No. Not from our perspective.

THE COURT: Well --

MR. SHERWOOD: Your Honor, the purpose of the stipulation, the solicitation procedures -- I mean, basically, what we did is we followed the procedures that were set forth by the debtor to a T. And they said if you have filed a proof of claim and you want to allow that claim not just for voting purposes, but also for classification purposes to file a motion, which we did, and we filed a -- we said -- we contend that we have a Class 12 claim for like two-hundred-and-some-million, then we amended it to the 435. And it was incumbent upon the debtor at that point and the estate, if they had a clear view -- I'm just -- I'm just --

THE COURT: I know what your argument was, but I did overrule you on that point.

MR. SHERWOOD: Okay. So let's -- let's get --

THE COURT: Where we are today.

MR. SHERWOOD: Okay. We -- just on that point and -- and we voted in Class 12, but I think the Court should be cognizant of the fact that had we voted in Class 18, the debtor would have -- the debtors' plan would have been in serious jeopardy because of the absolute priority rule. And -- and this was, to some extent -- not to some extent, but clearly gainsmanship on their part to put us in Class 12 at one point and then flip-flop later.

Your Honor, we relied on -- we relied on our Class 12 status in -- in exercising our rights pursuant to the plan and -- and there should be some finality at confirmation with respect to our treatment as a Class 12 creditor.

Let -- let me -- let me turn to the reserve issue. Again, the debtor drafted the plan. The debtor drafted the confirmation order. The terms of the plan are clear. They provide that to the extent that there is any dispute with respect to this or -- or that the order disallowing this claim is not resolved by a final order, the reserve has to stay in place. And the confirmation order and the plan should be enforced as written, again, by the estate. And -- and there's no reason to -- to deviate from that.

THE COURT: I understand.

MR. SHERWOOD: Getting -- getting to Tranquility, the standard for reconsideration is manifest injustice and it has to be -- the error has to be apparent to the -- to the point of being indisputable. And, again, I think if you look at their brief on Page 18 where they cite to SEC Rule 191 and the definition of -- of "issuer" and the bold part at the top of Page 18. It says that the depositor for an asset-backed securities acting solely in its capacity as depositor to the issuing entity is the issuer for purposes of the asset-backed securities of that issuing entity.

And then the same language is at the last part of Paragraph A in Paragraph 34 that's in bold. And I think this -- this really highlights that even the SEC rules recognize a distinction between a depositor in an issue and the issuing entity, just like Your Honor did in Tranquility. And I think that that philosophy, that rationale, is still good.

And, you know, in terms of the basis for that, I think, Your Honor, that there was that Slane and Kripke article that you cite in Tranquility and I think it's clear that the purpose of Section 510(b) is to guard against having someone who is an equity holder in the debtor or in an affiliate of the debtor being elevated to -- to the position of a creditor, and that's not what's happening here.

And then finally on Tranquility, Your Honor, the reported entity, the issuer, the depositor and -- and, you know, all of the entities in -- in the chart that was handed up by counsel to the committee, they are all included within these SEC definitions really to expand liability and reporting. And just because the SEC -- just because some -- there is a claim under SEC law, that doesn't mean that that law that governs that claim is suddenly going to govern a bankruptcy court's analysis under Section 510. And 510 purposes -- 510 has a completely different purpose and -- and Your Honor is -- and there's nothing manifestly long or grossly unjust about what -- what Your Honor's rationale was in Tranquility.

So, Your Honor, you know, based on all that we -- we think that -- that the language of the stipulation is clear and there has been a recovery under the plan to Class 18, which is a class that's receiving property and distributions for sure. And a contingent right of recovery is no less a recovery than an actual right. And it wouldn't make sense, also, Your Honor, to read the stipulation to wait for actual cash to come in -- into hand because that would be -- you know, at that point in time we don't know what the facts and circumstances would be. And, moreover, we're in Class 12 anyway so it just doesn't make sense.

So for those reasons, Your Honor, and really just

before I sit down I think it -- it would be unjust for Your Honor to allow the debtor and the committee to sort of play the game that they did by putting us in Class 12 and sort of laying down for voting purposes when they knew full well all alone -- all along that they were going to change their tune. I think that's playing fast and loose with the Court, certainly with me and our clients who, you know, deserve to have a day on the merits of their claim. And -- and that's all we're seeking here. We're not seeking a four-hundred-and-thirty-five-million-dollar allowed claim. We just want to know that we're in Class 12.

Thank you.

MS. KASWAN: Your Honor, could I just speak to some issues --

THE COURT: Okay.

MS. KASWAN: Counsel did address back to what hard work we did in --

THE COURT: All right.

MS. KASWAN: Your Honor, I'm not a bankruptcy lawyer. I'm a securities lawyers. And -- and that's why I wasn't speaking, certainly, in the first part of this argument. But the securities laws, both Section 11 and Section 10(b)(5) are disclosure statutes. They -- they don't turn on who owns the securities. They turn on who is the speaker. And in connection with Section 11, ordinarily,

the issuing entity and the issuer are the same. They are the ones who file the statements with the Court. They are the speakers.

And so Section 11 imposes liability if the disclosures are false or misleading. And that would be ordinarily on the entity that files the disclosure statements, the officers who sign the disclosure statements, and the underwriters who sell the securities. That's a very different concept than Section 510(b) which looks to the entity that owns the securities or in connection with the bond, the entity whose collectability and resources the debtors are looking to for repayment of the bond.

So that's why, you know, I believe that the regulation is irrelevant to the issue of a 510(b) question and, also, the securities law for interpretation of Section 11 and the issue of who is liable under the disclosure statutes is irrelevant to subordination under 510(b). Both of those statutes are directed to different concepts.

And certainly, you wouldn't say, for example, that WMI and the officers are affiliates even though the affiliates are speakers and, therefore, liable under Section 11, and WMI could be liable as a control person under Section 15 for the false statements by the officers. That's what's happening here is that because the depositor is the manager and the speaker, they are liable under Section 11;

that is wholly unrelated to the question of whether or not they are the owner of either the stock or the bonds that are being issued that -- the owner of the bonds or the issuing entity. And so that's why that's the appropriate entity to look to under 510(b).

THE COURT: Thank you.

MR. JOHNSON: Your Honor, very briefly on the point that Ms. Kaswan just made. I think she hit the nail right on the head. The question of the securities laws is who is the speaker and the question under the Bankruptcy Code is what is the definition of an affiliate.

Now where that intersects is right here on this chart. I just drew a circle around all the entities that are corporations and the ones that are affiliates. Washington Mutual Bank is an affiliate of WMI because it's one-hundred percent owned by WMI. WaMu Asset Acceptance Corp. is one-hundred percent owned by Washington Mutual Bank, and under Section 101 of the Bankruptcy Code, that means that WaMu Asset Acceptance Corp. is an affiliate.

And as Ms. Kaswan correctly pointed out, the securities laws do look to who is the speaker in order to determine where there is liability. And the basis of their lawsuit in Washington and their claim here is securities fraud against WaMu Asset Acceptance Corp. It's not against the trust, which merely held those mortgages.

So here we now have the intersection of the securities law providing the definition of what is the issuer and the Bankruptcy Code providing that if the issuer is an affiliate, then it -- it then matches the definition of what is an affiliate and, therefore, it needs to be subordinated under Section 510(b).

Thank you.

THE COURT: Thank you.

MR. STROCHAK: Thank you, Your Honor. Adam Strochak. Just -- just two very brief points.

Mr. Sherwood, I think, quoted from Section 22.1 of the plan, the treatment of subordinated claims, and he left out the key language. The plan says that "Commencing on the effective date and in the event that all allowed claims and post-petition interest claims in respect of allowed claims are paid in full, then each holder of an allowed subordinated claim will get liquidating trust interests."

That's the key language. The way the plan works is that until the waterfall fills up, there is no distribution of liquidating trust interests to -- to the holders of allowed subordinated claims.

The latter point I'll just echo what -- what Mr. Johnson said and perhaps put a little different slant on it.

You know, we -- we agree that the SEC rules do make a distinction between issuer and issuing entity. And

the key point, the whole -- the whole argument that we've made is that -- is that Section 510(b) doesn't make that distinction. There is no principal basis to make a distinction between issuer and issuing entity in connection with mortgage-backed securities.

And as Ms. Kaswan stated, you know, we're a little bit out of the ordinary here. This is not the ordinary situation where the issuer is both the entity and the speaker, as she -- as she put it. We're in a situation where -- where those were separated.

But what rational basis is there under 510(b) to say that, well, a claim against one would be subject to subordination, but a claim against another would not. If -- if the -- if the allegation is that there was illegality in the issuance of the securities, then -- then there's no reason to say that a claim against the issuer would not be subject to -- that is, a claim relating to securities of the issuer would not be subject to subordination as long as the issuer is an affiliate, and plainly in this case it was.

Thank you, Your Honor.

MR. ETKIN: This has been very difficult for me to just sit through --

THE COURT: All right. So --

MR. ETKIN: So with the Court's indulgence just two minutes.

THE COURT: Two minutes.

MR. ETKIN: First of all, I think we have a basic disagreement as to what provisions of the plan to -- to look to to determine --

THE COURT: You have to identify yourself for the record.

MR. ETKIN: I'm sorry, Your Honor. Michael Etkin, Lowenstein Sandler, bankruptcy counsel to the MBS plaintiffs. My apologies.

We're -- we're looking at different plan provisions. Your Honor, I think that Section 30.2 of the plan which Mr. Sherwood pointed out earlier, and which has not been the subject of comment by either the post-confirmation trust or the committee, says clearly and unequivocally that -- that Class 18, along with other classes, are receiving distributions pursuant to the plan. You can't -- you can't talk your way around that, Your Honor.

THE COURT: Well, you can if you look at the actual language of whether they're getting distributions.

MR. ETKIN: But, Your Honor, the debtors -- the debtors admit in the context of the plan that they're getting distributions. That's an admission. That's clear and unequivocal. They can't now say, well, we didn't mean it. They can't now say, well, you know, we -- we really

meant that it was non-contingent distributions. It says what it says and it's clear. So from our perspective, Your Honor, that really resolves the issue.

And then one point on this Tranquility argument, which -- which Mr. Strochak just talked about. The fact that there's no reason or no basis under 510(b) to distinguish between the issuer and -- and the issuing entity. Well, the SEC makes that distinction. They don't make that distinction. 510(b) doesn't talk about securities, doesn't talk about an issuer. 510(b) talks about securities, whether equity or debt, of the -- of the debtor or an affiliate of the debtor.

Now we're arguing as to who they think an affiliate of the debtor is. The fact is that the -- that the securities, the asset-backed securities are securities of the issuing entity. Now why do I say that? Because that's what the SEC rule says. It says that -- that the depositor is considered the issuer for all of those issues relating to reporting because they're the ones who have the information and they're the ones who would stand liable for misstatements with respect to that information.

But the rule goes further and it says, as -- as the debtors quoted in their -- in their objection, it says that the depositor to the issuing entity is the issuer for purposes of the asset-backed securities of that issuing

entity. That parrots the language of 510(b). The securities are of the issuing entity. They're not securities of the issuer. The assets of the issuer, performance of the issuer have nothing to do with the investment that was made.

This all makes perfect sense, especially when you look at the background of 510(b) which has been appended to tell the investor that you can't jump the line simply by asserting a litigation claim if you bought securities of the debtor or of an affiliate of the debtor. By virtue of the SEC's own language, these were asset-backed securities of that issuing entity. That issuing entity was not an affiliate. 510(b) does not apply.

Thank you, Your Honor.

THE COURT: All right. No more. I'll tell you what I am going to decide today.

First of all, the trigger has not occurred for purposes of the stipulation. There has been no recovery on Class 18 simply by confirmation of the plan or by the fact that the debtor allowed that class to vote. The reality is there has been no distribution of any property, cash, liquidating trust certificates, or anything to Class 18. The stipulation provided that no claim would be filed until that time and, therefore, the claim is premature.

With respect to the reserve, therefore, since

there is no pending claim, no reserve need be provided by the debtor in cash or in liquidating certificates.

With respect to the issue of whether there was an agreement that they would only file a Class 18 claim, there is nothing in the stipulation that says that. So at the time of the trigger, they are free to file a Class 12 claim.

With respect to the applicability of the Tranquility decision, I don't think the MBS plaintiffs can rely on that. It was not a decision with respect to their claim. The claims are different. In addition, it was not a final decision at all because of the pendency of the motion for reconsideration. I did not get the chance to address that motion or make any ruling on those arguments. So, quite frankly, it is not law of the case. If it were, I would exercise my discretion not to apply it to this claim.

But I think it's not necessary for me to decide the merits of that argument at this time because I think that the MBSA -- MBS plaintiffs do not have the right to file or prosecute a claim now and won't have that right until the -- any recovery is had on the Class 18 claims, and that means a -- an actual distribution.

Okay.

MR. STROCHAK: Your Honor, I think it quite makes sense for us to reduce your ruling to an order, circulate it to plaintiffs and then submit it under certification.

THE COURT: Okay.

MR. ROSEN: Thank you very much, Your Honor.

THE COURT: We're done with the agenda, then?

MR. ROSEN: That is the agenda, Your Honor.

MR. SHERWOOD: Thank you, Your Honor.

MR. ETKIN: Your Honor, I think there's one more thing on the agenda, which was the least -- and it could be handled quickly, I guess, but it -- there was a status conference in connection with the certification motion. I don't know that there's much to be said right now. I'm -- given the length of the argument on the certification, I'm not going to get into arguments on the objection filed. We can do that in reply papers prior to a scheduled hearing on the merits.

With respect to timing, and I think one of the issues that the debtors -- that the debtors raise is that issue. I guess we can talk to the debtor about that and see whether we can reach some agreement, or we can advise the Court and put it on for substantive hearing at -- at some omnibus hearing date in the future.

THE COURT: I think you should talk about whether or not we -- and when we have it.

MR. STROCHAK: We'll do that, Your Honor.

MR. ETKIN: We will discuss that, Your Honor.

THE COURT: All right.

All right. We'll stand adjourned, then.

MR. STROCHAK: Thank you, Your Honor.

MR. ROSEN: Thank you.

MR. SHERWOOD: Thank you.

(Whereupon, the proceedings concluded at 1:16 p.m.)

I N D E X

RULINGS

I N D E X (CONT.)

RULINGS

I N D E X (CONT.)

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I N D E X (CONT.)

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I N D E X (CONT.)

RULINGS

I N D E X (Cont.)

RULINGS

C E R T I F I C A T I O N

I, Sherri L. Breach, CERT*D-397, certified that the foregoing transcript is a true and accurate record of the proceedings.

SHERRI L. BREACH

AAERT Certified Electronic Reporter & Transcriber

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Date: May 8, 2012